

MICHIGAN SUPREME COURT

PUBLIC HEARING
JANUARY 17, 2007

CHIEF JUSTICE TAYLOR: Good morning. This morning is the time for public comment on administrative matters. The speakers are to understand, I think you probably already do, but you get three minutes for your remarks. Of course, you are able to submit additional written material to the Court if you wish. At the end of three minutes I'll be asking you to come to an end. On Item #2, it's 2003-21, which is involved with MCR 9.207. Our first speaker is Jan Eathorne.

ITEM #2 – 2003-21 – MCR 9.207

MR. EATHORNE: Thank you, it's an honor to be here today. I come here as a Michigan resident because I want a judiciary that we can now be proud of. I did review some of the posted comments by halt.org, Judge Redmond, and the recent media output, and it does – I agree that changes are overdue. I was a little concerned because this proposal is dated 2003, and that's four years old. And the proposal doesn't make any mention of two recently released reports – the November 2006 ABA New Model Code for Judicial Conduct in which the six canons are going to be switched over to four, nor does it make any reference to the November 2006 Breyer (phonetic) Committee Report and that's a guideline for future federal judicial conduct proceedings. I would like to see some changes. I'm not sure what prompted this rather dated proposal to be brought forward at this time, but I appreciate your considering revising how the Judicial Tenure Commission is currently being – how the Judicial Tenure Commission is usually being run. I am concerned today because I don't think that admonishments or censoring has any meaning to the public unless the judges be required to amend the behavior. Sometimes it can be as simple as an apology, other times it might be a change of the behavior, other times it might be some outreach to the public. I won't go into the details, but I did file a complaint with the Judicial Tenure Commission. They did contact me three times. They agreed that the conduct that I had reported was disturbing. However, no action was taken to correct the court file. The judge did not apologize to me for the misconduct. The Judicial Tenure Commission ignored the behavior of three attorneys who covered for the judge's behavior. The specific judge that I was most concerned about and that was her accepting money from a defendant was never asked to return to money, and furthermore the reprimand was never made public. As you know the public is watching the Judicial Tenure Commission a little bit more closely recently, and it's because there's an increasing sense of distress. I can't say that in my interactions

with the Judicial Tenure Commission they were indifferent, but what they did and what they represented to the public were two different things. So I would like you to reconsider this amendment, maybe take into consideration some of the newer reports that have come out by your own committees of – and people of the legal profession, and then act on those things. I want to say what most citizens are feeling and that is secrecy cannot be elevated above accountability. And when we go to the Judicial Tenure Commission and we have a genuine complaint and it's not acted in a manner that we can actual see the results then we tend to think that nothing was done. Thank you for your time.

CHIEF JUSTICE TAYLOR: Thank you Ma'am. Karen Stephens.

MS. STEPHENS: Good morning. My comments address MCR 9.207 specifically, however these remarks are also relevant to other matters at hand. It is noted Mr. Fischer of the JTC "urges the Court to leave the rule as it is" and HALT, a nonprofit for legal reform, "urges the Supreme Court to modify the proposed rule to provide real protection for litigants." U.S. Code Title 18 provides that judges are criminally liable for acts committed under color of law, however, when the JTC keeps information confidential there's no accountability to we, the people, the source of the Court's authority. To refresh this Court's memory I previously addressed public hearings regarding secrecy of the JTC and the AGC. The common knowledge regarding the secret removal of Oakland Chief Judge Barry Howard was brought forth as documented in affidavits and emails with the resulting affect that this secrecy colored a public perception of civil cases involving dubious real estate transfers. My accurate observations were met with turbid comments by two members of this Court. As an exercise to gather empirical data, I have tested the process to investigate the secrecy of the incestuous legal industry cartel which protects its own and is adverse to the Constitution. I filed JTC complaints against judges who lied in final orders, ruled based on expired administrative orders, didn't follow lower court rules which specifically selected rather than randomly assigned, issued secret never served retroactive orders without jurisdiction. Complaints were dismissed with form letters without explanation citing only anonymous complaint numbers. For instance, as was previously brought to the attention of this Court, Judge Martha Anderson granted an ex parte PPO based on known perjury (inaudible) threats or stalking with the intended purpose to keep myself and another scammed client of Attorney Nicolette (phonetic) apart. Marie Dreilich was jailed twice for nine days for attending the McDonald court as my witness. I was removed from the Anderson court and chased down by a sheriff's deputy for violating the PPO without being named or served just for having Marie Dreilich's possessions. After my JTC complaint this judge told me as extortion to pay the clerk's office \$500 forthwith without a court order or citing any court rule. The record states that we're not allowed to attend church or court together. Law never made a man just.

Civil disobedience for just causes is an honorable thing. The most absurd dismissal was regarding Judge McDonald who issued multiple and secret, never served retroactive orders to cover up Attorney Nicolette's embezzlement of my insurance check and liens for bogus attorney fees for over \$200,000. The judge simultaneously transferred my property rights and disqualified himself, then secretly undisqualified himself while my case was under the jurisdiction of COA. With prima facie evidence of bribes from the insurance companies, this corruption has been kept secret by the JTC, AGC, COA, and this Court by choosing not to answer relevant questions. Obviously, the politically correct misnomer confidentiality is an enabler of judicial vices. We, the people, require 100% candidness, not secrecy of misdeeds. Thank you.

CHIEF JUSTICE TAYLOR: Thank you Ma'am. Paul Fischer.

MR. FISHER: Good morning may it please the Court. Paul Fisher, I'm the Executive Director of the Judicial Tenure Commission. As we know the goal of the judicial disciplinary system is to protect the integrity of the judicial system and to protect the public as well. Only the Court can impose judicial discipline, the Commission is well of aware of that but the Commission also has the role – the Commission investigates, ultimately prosecutes if necessary, adjudicates, and recommends to the Court what sanctions we proffer. During the phase of the Commission acting as the investigator, when it becomes the prosecutor in essence, the Commission must filter out the disciplinary issues from appellate, political, other type of issues that don't belong in the judicial disciplinary system, and as such it has a role in preserving the integrity of the judicial disciplinary system. On average the Commission issues two formal complaints as to the public matters that come before the Court ultimately. But the Commission does far more than the two formal complaints out of the 600 or so grievances it gets each year – last year we had 665. We negotiate plea arrangements for agreed to sanctions, we have public sanctions and suspensions, those will become public. We also negotiate the early retirement or resignation of judges so that nothing ever becomes public - we did about 12 of those since 2001. And in an effort to get judges to conform with the rules of conduct, the Commission will also when it dismisses a matter admonish, caution, or explain to the judge what was wrong with that judge's behavior that did not necessarily warrant a formal complaint, but was still improper behavior. These admonitions, cautions, and explanations are dismissals – they're dismissals with admonitions, etc., plain and simple dismissals. They're not disciplines, they're not sanctions, they are part of the Tenure Commission's prosecutorial function in exercise of its prosecutorial discretion over which cases to proceed with. They assist the commission in fulfilling its constitutional role. In the six years since I've been the Executive Director we've had 57 admonitions, which is about 10 per year; 40 cautions, and 14 explanations. That's out of 3800 dismissals. That's the essence of the admonition/cautionary explanation system, is to try and

give the judge some way of knowing how to improve that judge's behavior. And it would seem that the Commission could just issue a dismissal letter – there, dismissed, and then send a second letter to the judge if it wanted saying by the way, your conduct in such a matter could be improved. Don't do that kind of thing again, perhaps the Commission will look at it in a different way since you've now been warned that that behavior is improper. This system works, it shouldn't be changed. Leave it intact. And also if the Court has any questions I'll – that's it. Thank you.

CHIEF JUSTICE TAYLOR: Thank you sir. Barbara Willing.

MS. WILLING: Good morning. It's nice to be back with you again today. Mr. Fischer used my opening line stating that the system works. The system doesn't work it's broke. It's not consumer friendly. It's not an easy user. We don't have any consumer protection. The court is a business. We don't have a business. When a person finds a judge embezzling money, when a person finds a judge committing crimes and we take it to the proper agencies, in my case I took it to the state police and the state police said I have to work with this man I can't do anything about it. The next step would be to the Judicial Tenure Commission. You embezzle \$5,000 and see what happens to you. If I embezzle \$5,000, I know what will happen to me, but a judge embezzles \$5,000 no harm comes to him. I went to the Judicial Tenure Commission. I spent hours on the phone with the investigator. Mr. Fischer was not, in his defense, in charge of the Judicial Tenure Commission at that point in time. I got one letter a one-line letter back from the Judicial Tenure Commission after a politically correct time had passed that said no cause of action. I later learned that the man who signed the letter was the brother-in-law of the judge. Now this Court has a rule on nepotism. I believe that the Judicial Tenure Commission does not work. And I believe that the only cure will be to take it out of the hands of judges and attorneys and put it into the hands of the people, after all it is my quasi-agency. It's mine, I own it. I'm a citizen here. That's my agency. I should be in charge, not me per se, but I should be in charge. You can't have the foxes watching the henhouse. When a judge is admonished, I come from Traverse City, in the last two years we've had two judges in trouble with the JTC, Haley and Gilbert. Gilbert, you only gave him 30 days off the bench, shame on you. That was an embarrassment to me. The man was caught using illicit drugs. You know what happens to a child who's caught with pot possession. He loses his license for 6 months. You know Haley, nothing happened to Haley, a hand-slap big deal, or Gilbert, I'm sorry. Haley is even worse. You should have gone and sat in his courtroom. Believe me his problem was a lot more serious than what was reported to the JTC. The man has not any semblance of judicial temperament whatsoever. I've literally court-watched in this courtroom several times. At one point, Benedict, who's the guy who gave the tickets was in the courtroom and when they saw me in the courtroom knowing that

I'm a court-watcher, Haley refused to get on the bench. The issue that I was fighting, all of the magistrates in Traverse City did not have an oath of office. Every one of them were issuing search warrants and none of them had the legal authority to do so under the Michigan Constitution. I tried to fight that problem as best I could. First I went to the County Commission, the County, the County Clerk. Then I went to the Treasurer – is there a bond on file for these magistrates and nothing happened there. I then went to the County Commissioner and said hey wait, none of these people have oaths of office you better reappoint them so that they can do their oath. I tried to do it quietly and secretly knowing full well that if this issue became public that it would cause a hysteria. What happened? Haley is involved in a death threat towards me with a Magistrate by the name of Pamela Blue (phonetic). Judges knew about, everybody knew about it, shame on them. Now should I go to the Judicial Tenure Commission and say hey look these two judges know about death threats and have done nothing.

CHIEF JUSTICE TAYLOR: Ms. Willing, I think you're time is up, thank you.

MS. WILLING: My three minutes are up. Before I leave, I did ask to be on the issue 14.

CHIEF JUSTICE TAYLOR: Yes, I've got you there.

MS. WILLING: Thank you very much.

CHIEF JUSTICE TAYLOR: Okay. Marie Dreilich.

MS. DREILICH: Good morning, my name is Marie Dreilich, and I would like to address judicial reform. When the media exposed Judge Edward Servitto, Jr. for going to Costa Rica with the Michigan boys where allegedly prostitutes were present, Judge Tyner for spending court hours at a spa, gym, and shopping, and Judge Borman for spending the day golfing, I would like to know where the Judicial Tenure Commission was. Why hasn't the Judicial Tenure Commission come forward with reports to the public, on how these incidents should be handled, investigated, and appropriately disciplined? The JTC is purposely engaging in secrecy when it comes to even their basic operations, and these events scream that the taxpayers have been violated. As an average citizen trying to report and detail the actions of the judges with more than an abundance of evidence, the JTC has written back a standard form letter to actually several complainants that received it, where it states that judicial misconduct is a term of art. I would like Mr. Paul Fischer to please define that phrase when denying an investigation of a judge. We the victims of judicial misconduct have no rights, and the secrecy surrounding what goes on in these so-called investigations is

abhorrent in the very least. We the public do not know how many complaints are filed against each judge. We do not know the process that determines which judges are investigated or not. We do not know if the complaint is thrown in the garbage or is filed for future use. All I know from being thoroughly abused by the legal system is that my property and \$300,000 in equity was stolen in an equity stripping scam from a judge. And I reported the tortuous and unlawful acts that were committed by Judge Edward Servitto to illegally transfer my property rights to a four-time convicted felon who also shares the same last name as the chief judge in Macomb County Circuit Court with no response, no investigation, this is with hundreds of exhibits and undisputed proof that this happened. I'm being evicted in less than two weeks as my property is being transferred to this four-time convicted felon who has attempted murder in the past, has voluminous record including drug use, assaulting a police officer, and everything, and it's just unbelievable that this happened. And the JTC has not acknowledged it, will not do anything, and the secrecy needs to stop. This needs to be public. Thank you.

CHIEF JUSTICE TAYLOR: Thank you Ma'am. Tom Whitaker.

MR. WHITAKER: Hello, thank you very much. I'm (inaudible) a carpenter by trade. My education is limited. I came here to talk today to just basically to say that it comes down to a fundamental and basic principle – just fundamental and basic rights, I mean, to even consider not letting the public have access to what is going on is absolutely wrong. When I realized that I was gonna come and speak here, I've spoken to many, many people, the number's approximately 50, I've spoken to all kinds of people. Staunch Republicans, Democrats, Independents, people that don't vote. I've spoken to police officers, I've spoken to people that work in court offices, and there is absolutely no one that has said no, that stuff should not be available to the public. The public should have full access to what's going on. You know to even consider keeping this information from the public – you want them to make an informed decision, you make an informed decision behind there. This is quite surprising you know the fact that I'm even here talking to you. It should be – I find it quite shocking that some of the stuff would even be considered. It should have just been thrown out, thrown out. The public deserves to have full knowledge of what is going on. The perception of injustice is so prevalent nowadays - corruption is one of the words. I mean one of the words that I believe is you know – I've heard is it justice or is it just us. I've had some experiences in court where you know everything is correct. I've had recent experience in Saginaw where I believe I never had a chance period under any circumstances it's just like the good ole boy network. It's alive and it's all too common nowadays. Politics is just everywhere. You guys are suppose to be nonpartisan that's what I understand. There is a place for it. You have a responsibility to represent the interests of the people I believe, that's the way I interpret it. Fundamental and basic, it's pretty simple, it's pretty cut and dry, and

what is perceived by the public is real. It doesn't matter if it's real or imagined it is perceived. I don't know what else to say except for thanks.

CHIEF JUSTICE TAYLOR: Thank you sir. We now move on to Item #3, Administrative File 2003-47, regarding the inactive asbestos docket, and Administrative Order 2006-6 regarding bundling of asbestos cases for purposes of settlement. James Bedortha is the first speaker.

ITEM #3 – 2003-47 – AO 2006-06

MR. BEDORTHA: It's nice to be here again. Thank you very much for giving me the chance to speak. As you know this is the third time in four years that I've been here on the asbestos issue. Some things have not changed in the asbestos litigation in the state of Michigan. There are still less than 3,000 cases. We think the filings are down. There's probably 2,700 or 2,800 cases state-wide, less than the last two times I was here before you. Less than 20% of the defendants, those represented by Dickinson Wright, support the antibundling order that was entered. The antibundling order was entered without a hearing because there was a need for immediate action found. I don't know what that need for immediate action was. I can tell you that the antibundling order has essentially tied the trial courts' hands by denying the trial court the tool of consolidation, the consolidation rules that were approved by this very Supreme Court to deal with similar cases involving identical defendants. And you've denied the trial court the ability to consolidate to manage its docket in a mass tort situation. We know that tens of thousands of Michigan workers were poisoned by asbestos working in the steel mills, the auto plants, the foundries, the powerhouses. They were injured by the same products. They were injured as they worked shoulder to shoulder. Consolidation and the rules allowing the trial court to use consolidation were meant to deal with this type of mass tort situation. As it stands now, a trial judge in Michigan could have three cases of a plaintiff – three different plaintiffs who slipped and fell in a Meijer's grocery store and they're all represented by the same lawyer. Meijer's is represented by a lawyer and they all have a broken arm or a broken leg. The judge can consolidate there. But if there are three individuals who are suffering from asbestos cancer and the claim is against a single or the – or an identical group of defendants because its asbestos, the trial courts can no longer consolidate. So I come here honored and humbled to be able to speak to once again, but the question is why are we here. Twenty percent or less of the Michigan defendants support this, the rest do not. There are law firms in Michigan other than Dickinson Wright who represent this other 80% and they have not joined in supporting this antibundling order. If you look on your own docket to see who supports the antibundling order, it may answer the question why are we here again. The supporters are the Dickinson Wright defendants, the Coalition for Litigation Justice, a conservative lobbyist think tank out of

Washington, D.C., and then an amicus brief filed by among others the National Association of Manufacturers led by John Engler, the National Chamber of Commerce –

CHIEF JUSTICE TAYLOR: Sir you're three minutes are up. Thank you.

MR. BEDORTHA: Thank you very much.

CHIEF JUSTICE TAYLOR: Mark Wisniewski.

MR. WISNIEWSKI: Chief Justice Taylor and Justices of the Supreme Court. My name is Mark Wisniewski, I'm the asbestos head of the Kitch law firm. I'm not with Dickinson Wright, I'm not with the Manufacturers Association. I've been doing asbestos for about seventeen years – started out with Jim Neese (phonetic) about nineteen years as his clerk doing asbestos. I'm here today to speak in favor of the continuation of Administrative Order 2006-06, the antibundling order. I think when Justice Young first talked about antibundling, we were a little bit confused because we kind of use that term of leverage. I think when Justice Young and Justice Corrigan kind of explained it to us we started understanding what the Court was trying to look at, and I think it goes back to what Justice – Mayor Archer talked about in front of the Legislature about the issue of leverage. Consolidation – when we look at consolidation we talk about leverage. I believe that no trial court should use leverage to settle cases. And if a court is consolidating cases for settlement and/or trial for leverage, it should not be used. Both parties, plaintiff and defendant, should come before the Court as equals. Leverage – just the definition means that one side has more than the other side from the beginning. And if we're talking about just simple facts, obviously each case – some facts are better for the plaintiff versus the defendant, but when we're talking about bringing an entirely different case in to leverage this case that's just wrong. It's wrong for a plaintiff to do it, and it's wrong for a defendant to do it. The plaintiffs' attorneys have told you they don't do that in Michigan. And I liken this to the speed limit. If I drive 40 miles an hour and the speed limit is 55, I could sit there and say we don't need a speed limit. But the speed limit is there in case I'm tempted to drive over 55. Antibundling stops the temptation of leverage, not only from the defendants, the plaintiffs, and the trial court judges. I understand trial court judges want to clear their docket, but never at the cost of the rights of the parties. Thank you.

CHIEF JUSTICE TAYLOR: Thank you sir. Michael, excuse me, Colleen Mountcastle.

MS. MOUNTCASTLE: Good morning. My name is Colleen Mountcastle as you just said. I represent Grand Trunk Western Railroad Inc. who's involved in several asbestos related actions throughout various courts in the State of Michigan. I am an Ohio lawyer. My firm represents Grand Trunk in Michigan, and the reason that I'm speaking to you today is in support of the antibundling order. A very real concern that this Court addressed in the antibundling order are the due process considerations and the constitutional protections that this order provides to litigants. I want to bring to the Court's attention because there was concern that the antibundling order contradicts a Ninth Circuit Appellate decision, I would like to reassure the Court that there are Fifth Circuits and Third Circuits Court of Appeals decisions that are actually favorable and supportive of this Court's antibundling order. I would also like to note as an Ohio lawyer, Ohio has 44,000 asbestos related actions on its docket. In July 2005, the Supreme Court of Ohio actually put together an anticonsolidation rule much like this Court has done and in that instance they have 44,000 cases on their docket compared with the lesser number that this Court – or that the state of Michigan has. The reason that this is important is this Court has taken a step in the right direction. It is following the trend that other states are following with respect to handling their asbestos docket. It has the authority to control this docket, and quite frankly if action isn't taken in Michigan, the propensity exists that claimants will find Michigan to be a safe haven or a more comfortable jurisdiction to bring their asbestos related actions. You don't want to have a docket of 44,000 asbestos-related cases that doesn't exist now by keeping this order in place and taking actions to keep these cases from being consolidated when they do not have common issues. That's a step in the right direction and the antibundling order should remain in affect. Thank you.

CHIEF JUSTICE TAYLOR: Thank you. Michael Serling.

MR. SERLING: Good morning Justices of the Court. In my thirty-two years in specializing in asbestos litigation, I have seen five judges in the Wayne County Circuit bench and numerous judges in the out-counties go from a system of difficulty in dealing with mass tort litigation to getting an efficient system running with the help of able lawyers on both sides. And able lawyers on both sides and the courts have contributed to a very efficient system, and efficient in the sense and assisted by the fact that technological develops have allowed lawyers to analyze and assess cases at a much greater speed because large depositions and pleadings can be submitted electronically, and so the courts have evolved to where they've been able to resolve cases. And lawyers on both sides for different reasons have chosen settlement in the vast majority of circumstances because they're able to review the cases when they come up for trial whether it's Judge Colombo, or Judge Clulo, Judge Borrello, or any of the specialized judges, the lawyers from different perspectives – the plaintiffs from a perspective that with mass tort reform

the alternatives for trying cases don't make a lot of sense because of the caps and other tort reform that has been passed. From the defendants' perspective, the numerous defendants in each case make it – make the responsibility for each defendant less and when compared with the economies of scale of trying every case lend themselves also towards settlement. And it should not be surprising to the Court that even after the order of August, cases were still resolved. That's because the lawyers on both sides favor settlement. Now what the Court has done here in prohibiting judges, specialized judges, from presiding over settlements and trials if they became necessary has bogged the system down and potentially could result in a situation or circumstance where a judge might be able to get the parties together when they're not and avoid long and costly trials. The lawyers on both sides really do not want to try these cases - that was done. There are very able lawyers here. They are some of the best and could try the lights out of these cases, but over time they have determined that it's best for their clients on both sides to resolve cases through settlement. This Court – I commend this Court for the action on the inactive docket by recognizing that it was a legislative function. But I think the Court made a serious error in passing this resolution, or this order, not permitting asbestos judges to convene or preside over settlement conferences. Lawyers, or judges should be allowed to do what they can to resolve cases, they shouldn't be prohibited. And I urge one of the members of the majority, at least one, to join the minority and to do away with this order which you could create a lot of chaos in our system of asbestos litigation and set us back 30 years. Thank you very much.

CHIEF JUSTICE TAYLOR: Thank you sir. Mark Granzotto.

MR. GRANZOTTO: Good morning. I read with interest the transcript of the May 23, 2006 public hearing. And what I think is the most important thing to take from that transcript is the fact that when this Court first posited the questions related to bundling, you were met with basically complete empty stares if I can read the transcript correctly. People did not know what you were talking about in terms of bundling and there's a reason for that I think fundamentally. And that is what this Court was attempting to address was not an issue that the attorneys on both sides of this particular type of case were dealing with. In point of fact, there was no bundling in the sense at least that this Court expressed at the public hearing the last time, what this Court expressed as the main problem was this leveraging associated with consolidating cases in which there were different levels of injury to the plaintiff. That is not – that was not a problem, that was not done. There was no such thing going on in the courts; there was no consolidating of these things in order to convince people to settle. You've heard today from the defense side that the reason you should keep this thing in place is because it will eliminate the temptation, not the actual fact of this bundling going on, but the temptation of doing this in the future. The fact is that asbestos cases are no different than any

other cases in terms of how they get resolved. You get settlements in asbestos cases by scheduling them for trial. It's the same thing in virtually every other piece of civil litigation that I've seen. Moreover, the factors which lend themselves to a settlement are precisely the same in asbestos litigation as they are in any other case, that is of course the uncertainty of the outcome, the expectation that the parties have with respect to that outcome, and ultimately the costs. And the costs are a very important factor in these cases. And the simple fact is that there was a sort of equilibrium as I see it that had been reached before this Court's order. And the equilibrium was, as Mr. Serling has just told you, in favor of settling these things. But the settlements were not gained on the basis of a leveraging, on the basis of looking at – or being threatened by a trial in which there would be both an examination of the more serious cases grouped with these less serious cases. The simple fact is that these settlements were gained the way all settlements were gained. They were gained by scheduling these cases for trial. And as the dissent has pointed out, this Court's order, in terms of establishing this antibundling situation, may have unintended consequences which are going to upset the equilibrium that exists. May or may not, but the fact is that this Court's order may have some unintended consequences. Thank you.

CHIEF JUSTICE TAYLOR: Thank you very much. We'll now turn to item No. 8. This has to do with -

MR. CRIMANDO: (off mike)

CHIEF JUSTICE TAYLOR: Oh, I'm sorry you're right, I apologize. Mr. Crimando. I apologize.

MR. CRIMANDO: I don't want you to forget me today.

CHIEF JUSTICE TAYLOR: Okay, sorry.

MR. CRIMANDO: It's not a problem. My name is John Crimando, and I'm not here from Dickinson Wright, I'm from the law firm of Crimando & Cleland. My clients are not Dickinson Wright clients. I am a defense lawyer and my clients are in favor of maintaining the antibundling order for all of the reasons that were said in support this morning. There's a television ad that's going around right now that I kind of like where there's a bunch of people in a fast-food joint and they're going around and around in circles and a – until one of the guys pulls out some cash and everything stops and all the food goes flying in the air because he has upset the apple cart. We have a situation here – and I don't want to call it bundling, because I don't think I need to. But we have a situation here where that potential exists in – particularly in Wayne County, Michigan where 100 cases are called for trial. At the last trial call in November, my clients were involved in 97

cases and we happened to be in the three that Judge Colombo said were gonna be tried. So we were present with Mr. Serling's office when those cases were being discussed for settlement purposes. There were other defendants, or at least an other defendant that was not present because his client was not involved in any of those cases that were gonna be tried if the cases didn't get settled. However, when the other cases went away he got a call very late in the day on Thursday or Friday and said you're picking a jury on Monday unless you get rid of your case or cases. And that's what I'm concerned about. When I'm dealing with – when I'm trying to make recommendations to a client about a 100 cases, I don't know on the Wednesday before the Monday which of those 100 cases is gonna get tried. And I don't have enough time during the settlement – during the discovery time that (inaudible) given to me because of the orders – the discovery orders of the court to take the discovery of the co-worker witnesses, to get the expert reports, to get everything that needs to get done. Yes, there's a good system in place for a settlement, but what's gonna happen – what's gonna throw all those food carts up in the air is one of these cases are gonna get tried. And everything's gonna get backed up. And we can only – now we're in a situation where we can only try one of these cases at a time which we should. But I still don't know because this bundling order is a step in the right direction, but we need to do something more. And I'm here, and I know that's not exactly the topic here, but I'm here to suggest to the Court that we do need to find some way to get an inactive docket. We do need to find a way to get some of these other claims out of the way so my clients and the plaintiffs' clients have an opportunity to fully prepare these cases for the trial that has got to happen and is gonna set everything back. Thank you.

CHIEF JUSTICE TAYLOR: Thank you sir and, again, I'm sorry I overlooked you.

MR. CRIMANDO: Not a problem.

CHIEF JUSTICE TAYLOR: Moving on to Item # 8 – 2005-19 – and Michigan Court Rule 2.512 regarding reforms of juries. Judge Warren.

ITEM #8 – 2005-19 – MCR 2.512 etc. - JURIES

JUDGE WARREN: Good morning Mr. Chief Justice and Associate Justices. Justice Young, great tie. As an Oakland County Circuit Court judge I have tried approximately 30 jury trials each of the three years I have served on the general civil and criminal docket. I offer the following insight on administrative file No. 2005-19. First, juries and judges generally perform an excellent job today. I have doubt that there is a jury crisis requiring extensive revision of the jury rules. Some of these proposals appear to be based on one or two exceptional circumstances as opposed to systematic problems and those issues are best dealt

with elsewhere. Second, generally less is more. Trust your trial judges to exercise their discretion and administer justice in the ways they're familiar and have used successfully for generations. Third, I generally agree with allowing new options for judges but not requiring them to undertake such procedures. For example, I personally am very wary about allowing jurors to discuss a case before the close of proofs or allowing judges to comment on the evidence. However, in some cases these approaches maybe appropriate. The key is to allow the judge to make that determination. I strongly urge you to consider making nearly all these proposals discretionary as opposed to mandatory and to allow judges to decline to use these procedures without fear of being appealed because the judge did not undertake a twelve-point balancing test in making the decision about whether to use certain of the processes. The judges should simply be free to undertake or decline to use the new options.

JUSTICE MARKMAN: Judge Warren?

JUDGE WARREN: Yes.

JUSTICE MARKMAN: Aren't the overwhelming number of individual proposals here in fact discretion? Most of them are prefaced by the court may do something as opposed to --

JUDGE WARREN: Many of them are and that's why I'm supportive of that. Since they're drafts, I suppose you could change them and make them mandatory, and I'm very concerned about what right now is drafted as may becoming required. Fourth, I offer the following comments about specific proposals. Requiring judges to give model civil jury instructions, I think this is a mandatory one, raises new difficulties. Generally judges do so, but each case needs to be evaluated separately, and I am uncertain if the requirement that they "accurately state the applicable law" is sufficient. The new rule may give an undue presumption of accuracy and applicability that could leave some judges to give erroneous instructions when the law has changed or the facts do not fit the instructions. Moreover, such a rule could embolden the committee to think that they can or ought to create law because whatever decision the committee makes will then be read to the jury. The (inaudible) is that is the role for the Legislature and the Court, and this danger should be carefully considered. The courts responsibility to "limit the evidence and arguments to relevant and proper matters" in effect requires the court to become a third lawyer, interposing objections and perhaps interfering with trial tactics on the development of the case. Every case will now have a new issue for appeal. The trial court failed to exercise its duty to limit evidence and arguments even when not objected to. I think this is most unwise. Requiring judges to encourage the creation of notebooks is micromanagement of the highest order. Also this will require judges to review the

notebooks in advance, potentially grinding the administration of justice to a halt. I know it's an encouragement and I'm not sure what that means, but I'm concerned about that.

CHIEF JUSTICE TAYLOR: Judge Warren, I'm sorry but your time is up. Perhaps you can submit those in writing to us.

JUDGE WARREN: Thank you very much. Who should I give the written comments to?

CHIEF JUSTICE TAYLOR: Mr. Palazzolo. Douglas Shapiro.

MR. SHAPIRO: Good morning. My name is Douglas Shapiro and I'm here today as a member of the Negligence Council of the State Bar of Michigan. This council, made up of equal numbers of defense and plaintiffs lawyers, represents the nearly 2,500 defense and plaintiff members of the Negligence Section of the State Bar. Given the short time allotted to each speaker today I'm going to address the Court only as to the three proposals that the Negligence Council unanimously opposes. These three proposals are judges' comment on the weight of the evidence, expert witness scheduling and expert panels, and the use of deposition summaries in lieu of transcripts. In his remarks to the State Representative Assembly about these proposals Justice Markman said the burden of persuasion in this realm must be upon the proponents of the change. And the unanimous conclusion of our Council is that the proponents of these changes, if in fact there are any, have failed to meet the burden of persuasion. There is no demonstrated or even articulated need for these radical changes, and their cost both in dollars in the administration of justice are high. Permitting the judge to comment on the weight of the evidence makes the trial judge a super juror. Allowing the judge to do so disengages rather than engages the jury, and it would destroy the judge as the symbol of law and neutrality and it would result in appeal, after appeal, after appeal, and frankly the power would be most used by those judges who should least be entrusted with it. The proposed rule regarding the scheduling of experts and the use of expert panels should be rejected. Scheduling experts in succession offers little gain and much cost. Prosecutors and plaintiffs' lawyers do not want defense experts testifying during their case in which they have the burden of proof. But defense lawyers are also opposed to this proposal. They do not want a rule which allows the plaintiff's side to decide when and with what foundation the defense experts will testify. Expert panels are not used in any jurisdiction in this country. They have zero track record. And above all such panels are inconsistent with the rules of evidence. Such panels will result in an evidentiary free for all. The hearsay rule will have no meaning and we can expect regular violations of rules concerning relevancy, prejudice, character evidence, subsequent remedial evidence and so. Finally, the proposal both as to scheduling

and as to the panels is logistically staggering. Arranging both sides' expert simultaneously is a task that cannot be accomplished, and we will lose the most qualified experts as their schedules, academic, clinical and so on, are the most difficult to manage. In addition, the cost of \$500 an hour experts sitting through the testimony of each other and perhaps waiting days is too much and expenses will be made nevertheless. Lastly, deposition summaries. There are constitutional implications here. Jurors will be disadvantaged hearing only a summary rather than the actual testimony. Credibility cannot be determined and substance maybe altered. But in addition the trial judges are gonna be asked to determine what is a fair summary. What guidance do they have? The Rules of Evidence don't tell them how to make a substantively fair document. It tells them how to rule on procedural questions. Again, appeal, after appeal, after appeal, and for what gain to save a few minutes in the courtroom perhaps. In conclusion, the view of this Council of the State Bar is that these three proposals are very bad. There's no need let alone a compelling need to have these radical changes to our system. Thank you.

CHIEF JUSTICE TAYLOR: Thank you sir. Jesse Reiter.

MR. REITER: Thank you Chief Justice Taylor and the other Justices. It's Jesse Reiter, I'm here for the Michigan Trial Lawyers Association. We prepared a report which we submitted to the Court at the Court's request in November, and basically I'm going to rely on what was in the report. I will summarize a very few points and take as little time as possible. The expert panels – we sought out consensus from attorneys from the Michigan Defense Trial Council the State Bar, there is no one that is in favor of these expert panels. And the reason why and for anyone who's tried these type of cases especially medical malpractice cases, it's impossible to get all the experts together in a panel on one day. It's logistically impossible. So the defense attorneys don't want this, the plaintiff attorneys don't want this, I don't think the judges want it.

JUSTICE MARKMAN: Well, Mr. Reiter?

MR. REITER: Yes.

JUSTICE MARKMAN: I understand there may well be considerable logistical complexities, this one of those provisions I think that's introduced by the court may do this -

MR. REITER: Yep.

JUSTICE MARKMAN: It seems to me the question is not whether or not there maybe many circumstances in which this is logistically difficult or wouldn't

be a good idea for other reasons, but can you conceive in any cases particularly complex cases in particular in which this maybe helpful to the jury, and after all that's the common theme of these reforms that the jury be able to comprehend the case more easily.

MR. REITER: Sure. Your honor, with all respect I cannot conceive of a chance where this would be helpful to a jury because in complex cases you have all different types of experts from different specialties and there's no way to get them all there at one time speaking --

JUSTICE MARKMAN: Well, that's a logistical problem, and I don't gainsay that and I don't minimize it, but again can you conceive of any case in which in a particularly complex dispute, a jury might be assisted by having experts testify not sporadically and widely disparate times during the trial, but one after another so that they can compare and contrast the testimony more easily.

MR. REITER: I can't your honor because I can't see how that could be a workable situation, and I can't see how you can get all, for instance pediatric neurologists there with a neutral person, I'm not sure who that neutral person would be, how the experts would be questioned by the attorneys and the jurors. I can't imagine how that could feasibly work. I can't see a scenario where that would work or would be workable. So that would be our main issue that the expert panels -- we don't think they're workable. We think a lot of these suggestions about jurors taking notes are excellent ideas they've worked in other states and we are in favor of those with certain limitations and all of our opinions are set out in our brief. Thank you very much.

CHIEF JUSTICE TAYLOR: Thank you. Now turn to administrative file 2005-41 -- has to do with issues concerning the State Bar's policy of confidentiality regarding certain matters. The first speaker is Patrick Clawson.

ITEM #9 -- 2005-41 -- State Bar Rule 19

MR. CLAWSON: Good morning. I'm a citizen with over 30 years experience investigating bad lawyers as a reporter - NBC News, CNN, and others, and as a private investigator. Proposed Rule 19, the State Bar's Secrecy Rule, does not serve the public interest or any compelling state interest. It will harm the citizens of Michigan, and seriously undermine public confidence in the judicial system. The rule is extremely overbroad. It cloaks in secrecy information that should never be secret at all. For instance, the President of the State Bar has told the Detroit News in the past few days that one reason the rule is needed is to, get this, to protect the confidentiality of bar recommendations for lawyers about the best off the shelf software packages. What in the world is it an official state secret

about that. These are not nuclear defense secrets we're talking about here folks. Cloaking the State Bar in the blanket of secrecy is deeply flawed in the matter of public policy. Secrecy is a cancer on democracy; it's an enemy of freedom. An open transparent system is essential to demonstrate the fairness of the legal system and to reduce public suspicion of it, and we've heard plenty of public suspicion of it in this courtroom this morning. What's needed in Michigan's legal system is more openness, not more secrecy. The records of the State Bar of Michigan are public property, they belong to the citizens of Michigan, not to the Bar. The public has a legitimate if a (inaudible) interest in reviewing the records. The public has a right to know how the Bar administers its programs like the ethics program, the program cracking down on the unauthorized practice of law - the Client Protection Fund. The proposed rule will cut off virtually all public access to information and records about these programs. It will also prevent good public oversight of how the public's money is used. I believe proposed Rule 19 is unconstitutional. Under art 9, §23 of the Michigan Constitution citizens have the right to examine records relating to the use and expenditure of public funds. The State Bar cannot exempt itself from the Constitution through administrative rule. How can the public have any confidence in the administration of justice in this state and the integrity of the legal system if the State Bar is permitted to keep secret the records of the Client Protection Fund or any other programs aimed at protecting the public from attorney misconduct? Secrecy is an enemy of public trust in justice. Any secrecy rules should be drawn as narrowly as possible. The proposed rule is greatly overbroad. I ask the Court to reject this rule, and on its own motion to issue a rule making it clear to the citizens of Michigan that State Bar records are open to the public in order to promote justice in this state. The citizens of Michigan deserve no less. I'm happy to take any questions.

CHIEF JUSTICE TAYLOR: Thank you sir. Patricia Hubbard.

MR. CLAWSON: Your honor Trish Hubbard sent me an email this morning. She's very ill and is unable to attend the hearing today.

CHIEF JUSTICE TAYLOR: Thank you sir. Michael Alan Schwartz. Steve Raphael.

MR. RAPHAEL: Your honor the name is Raphael, last name. Good morning. My name is Steve Raphael, I'm president of the Detroit Society of Professional Journalists. I want to thank you folks for providing the time to allow us to challenge proposed Rule 19. There isn't anything I can add to what my colleagues have said or have submitted recently regarding the proposed ruling – luckily that I couldn't see it much better than they could anyway so I – that saves me some trouble. Still I have to address two of the State Bar's arguments that I find baffling. The first is the Bar's position that the name of a lawyer's accuser

should be kept secret. The Bar says this protects the accuser. But so what, the accuser always had the right to face its accuser throughout American history except in rape cases. This has been a staple of American law. Why do lawyers feel that they have to protect their accusers while other American accusers don't get the same protections? American's a big (inaudible) –

JUSTICE CORRIGAN: Mr. Raphael, a point of information sir, where exactly with reference to this administrative file does that statement appear that you're referring to? If you can't find it, you can write to us and let us know where it is all right.

MR. RAPHAEL: Thank you.

JUSTICE CORRIGAN: Thank you.

MR. RAPHAEL: I suspect the intent in all of this is to protect the accused. I mean too many public accusations against a lawyer would be embarrassing regardless of the merits of the charges, and embarrassing strikes me as a shaky reason to put the clamps on somebody making an accusation. What strikes me at least as cowardly and as most a total disrespect of mistrust of the very American legal system they have taken an oath to honor and uphold. The other baffling thing is the State Bar's request of an anonymity under the Practice Management and Resource Center for those members who seeking advice from other professionals for cases they are working on. Why? Are attorneys fearful that by doing a simple humble thing admitting they don't know everything, they'll perceived as incompetent? Or is it because they'll create an image of themselves as being omnipotent and wish not to be exposed? If my lawyer were to seek an expert advice from his peers on any issue I was involved in, I would be delighted. And in fact this happened to me thirteen years ago to the betterment of applying my lawsuit. I exposed lawyers for an erosion of public trust, and I began to think that maybe the lawyers don't trust – don't want other lawyers to know what they don't know. In other words ego. By day I'm a mere journalist, but by night I'm a working historian. I could have dug through any number of history books to find insightful quotes by famous Americans about the value of an open society and its importance to democracy. But most than not, I'm (inaudible) to believe that quoting a Lincoln or a Jefferson on this issue -

CHIEF JUSTICE TAYLOR: Mr. Raphael?

MR. RAPHAEL? or repeating chapter and verse --

CHIEF JUSTICE TAYLOR: Excuse me sir.

MR. RAPHAEL: of relevant and historical events to explain why America was invented would change anyone's mind.

CHIEF JUSTICE TAYLOR: Mr. Raphael your time is up.

MR. RAPHAEL: (inaudible) into account?

CHIEF JUSTICE TAYLOR: I've given you quite a bit more. Thank you. You can submit that to us if it isn't here already. Debra Bohm.

MS. BOHM: Thank you very much for letting me speak today. Had I known before I hired my most recent attorney that I could have found out about any ethical lapses, I would definitely not spent thousands, upon thousands of dollars hiring him. If I can help one person with the information that I have sent the State Bar of Michigan, I will be a content resident of the state of Michigan. Unfortunately, I did not have the insight to check on these ethical lapses. If Rule 19 passes, no person of the public will be able to look into a lawyers past ethical indiscretions. Every position in our government has a certain checks and balance system in place. This chance for the public to glimpse any past indiscretions just maybe a small part in the check and balance system of the lawyers. Not all lawyers will be worried about having their ethical actions available to the public because not all lawyers are unethical or have ethical lapses. It is the unethical lawyer who lapses and hurts his clients and the unsuspecting client that this rule will hurt. Lawyers are held to a higher standard than the mere public. They have a duty to serve their client to the best ability that they can both legally and ethically. Please when discussing this amendment, think not only of the position of the lawyers in the State Bar of Michigan have taken, it is the people of this state that need the protection from unethical lawyers. The people of the state of Michigan should have access to the records of the ethical practice of the person that they choose to represent them on their behalf. Thank you.

CHIEF JUSTICE TAYLOR: Thank you Ma'am. Peter Psarouthakis.

MR. PSAROUTHAKIS: Psarouthakis your honor.

CHIEF JUSTICE TAYLOR: Thank you.

MR. PSAROUTHAKIS: Thank you. My name is Peter Psarouthakis. I'm the current president of the Michigan Council of Private Investigators. Thank you for allowing me this time to address proposed Rule 19. Our Association represents the interests of the approximately 1,200 licensed private investigators in Michigan. Many of our members are former federal, state, and local law enforcement investigators. At a membership meeting just last night, several

members brought to our attention a couple of issues that I'd like to address now regarding this rule. Many of our members are contracted by federal, state, and local government agencies such as the Department of Defense to conduct security background investigations. These members feel that the proposed rule may hinder their ability to obtain necessary information to conduct these investigations which in many cases are directly involved with national security. This worries us if this is indeed the case. Our members also conduct civil investigations. This proposed rule appears only to address disclosure and production of information in criminal cases. This concerns our members as well. We urge the Court and the State Bar to redraft this rule in such a way that will clarify these issues. Thank you very much.

JUSTICE MARKMAN: I'm sorry sir.

MR. PSAROUTHAKIS: Yes.

JUSTICE MARKMAN: What again did you say were the national security implications of this rule?

MR. PSAROUTHAKIS: Our members addressed to me last night, several of them, that our contracted by government agencies like the Department of Defense that the way we read this rule -

JUSTICE MARKMAN: You mean the members of the Michigan Bar.

MR. PSAROUTHAKIS: No, members of the Michigan Council of Private Investigators that are hired that this rule may, the way they interpret it granted, may hinder their ability to obtain information while they're doing background investigations on security clearance upgrades, on new hires for employees of different agencies, and they are themselves not a government agency they are contracted by the agencies and it's common practice across the country that licensed private investigators do this type of activity. So I'm here to bring to you their concern.

CHIEF JUSTICE TAYLOR: Thank you sir.

MR. PSAROUTHAKIS: Thank you.

CHIEF JUSTICE TAYLOR: Jeremy Steele.

MR. STEELE: Good morning. My name is Jeremy Steele and I'm the president of the Mid-Michigan Chapter of the Society of Professional Journalists. It's in this capacity --

JUSTICE KELLY: The society of --

MR. STEELE: The Society of Professional Journalists. It's in this capacity that I'm here to express my organizations concerns about proposed Rule 19. SPJ is one of the oldest and largest journalism advocacy organizations in the United States. Among its core missions, SPJ strongly promotes the protection of public access to government documents and institutions. The rights of Americans to have access to government records and meetings and to the judicial system is one of the most important concepts of democracy in the United States. As James Madison recognized "a popular government without popular information or the means of acquiring it is but a prologue to farce or tragedy or perhaps both. Knowledge will forever govern ignorance and a people who mean to be their own governors must armed themselves with the power knowledge gives." Proposed Rule 19 would block access to certain information held by the State Bar itself a government agency. Some of these restrictions maybe warranted in some cases. Medical records, for instance, are widely recognized to be protected from public disclosure. There is certainly compelling government interest to protect these kinds of records. However, this rule as written would block access to all State Bar records relating to a host of programs. The only exception in this rule is in response to a criminal subpoena or to government investigations into related activity. As such this rule is overly broad. It's my understanding that the State Bar has agreed to work with our friends at the Michigan Press Association to address some of the concerns the SPJ and the MPA share. I'm greatly encouraged by that. SPJ recognizes some of the documents and programs in question deal with sensitive issues, but the public should have a mechanism to see these documents under appropriate circumstances. Regular citizens should be able to see how these programs are run, how they're used by members of the legal community, and in some cases who was using them. This rule could be used to block such appropriate efforts. On behalf of SPJ's Mid-Michigan Chapter, I urge the Court to help protect the people's access to its government by rejecting Rule 19 as proposed. Thank you very much.

JUSTICE YOUNG: Are you aware of the negotiations between the Bar --

MR. STEELE: I'm sorry?

JUSTICE YOUNG: Are you aware of the current negotiations between the Bar and a lawyer representing media?

MR. STEELE: Yes, as I mentioned it's my understanding that the Bar is working with MPA, Michigan Press Association's general counsel on some of these concerns which --

CHIEF JUSTICE TAYLOR: Thank you sir.

MR. STEELE: Thank you.

CHIEF JUSTICE TAYLOR: Sal Andringa. Tom Whitaker.

MR. WHITAKER: Thank you once again. Proposal 19 is bad period, fundamentally the way I view it. Its bad for me; its bad for everyone in this room, its bad for everyone in the state of Michigan, its bad for you also. I don't know what else – there really isn't anything else for me to say. These people are saying it pretty good. You look – I view you as being very wise. I respect that. Number 19 would – I believe you would lose a certain amount of respect. The judicial bar should be held accountable to the people that need access to it you know that's just good for everybody. Thank you very much.

CHIEF JUSTICE TAYLOR: Thank you sir. Robert McGee. Victoria Kremski from the State Bar. As I understand it Ma'am you're present for any questions which the Court might have. But you're of course able to make remarks if you wish.

MS. KREMSKI: Thank you. Victoria Kremski appearing on behalf of the State Bar of Michigan. We'd like to respond to a few misconceptions. One of the concerns that has been addressed or raised this morning is that the records of the State Bar of Michigan that are being discussed this morning would not be available except through subpoena. The Rule reads that the records would be available pursuant to court order after notice and hearing. One of the issues that was raised was that the Rule is overbroad. Just for a perspective, I would like to inform the Court that these sort of rules are in place in bar associations and supreme courts all around the country. In fact Oregon which has the most open system in the country in terms of records has both – has confidentiality rules in place for both their lawyers and judges' assistance programs and their law practice management programs.

JUSTICE MARKMAN: Ms. Kremski can you briefly make the affirmative case for secrecy?

MS. KREMSKI: Well, yes, your honor, the rules and the policy behind the – and I'm sorry I wouldn't say it's secrecy as much as confidentiality.

CHIEF JUSTICE TAYLOR: Why is it a good idea that's the question?

MS. KREMSKI: The policy reasons change for – depending on the program. The (inaudible) policy reason behind all of these programs is that we want to encourage members and the public that utilize these programs they have confidence in the – because their identity won't be revealed and encouraged usage. And if I could give some examples. The members of the public that utilize the unauthorized practice of law program always ask that their identity will be confidential before they make a complaint about somebody who's engaged in the unauthorized practice of law. They're worried about being retaliated against. The same with the Client Protection Fund, claimants – usually they want to know that the circumstances regarding their retention and discussions with the lawyer will remain confidential. On the ethics programs, we want to encourage the - the lawyers that use the ethics programs are lawyers that are facing situations and they want to ensure that they will be making the best decisions for their clients. It's not a program that's trying to advise lawyers that are in trouble. In fact, I'd like to respond to Ms. Bohm's concerns about not being able to find out about an attorney's past misconduct. The Attorney Discipline Board has a website that lists all of the Michigan attorneys that have been disciplined since 1978. And as the Court knows Rule 19 does not implicate any discipline records, those are handled by the Attorney Discipline Board and the Attorney Grievance Commission which have their own set of rules that have disclosure provisions. For anyone interested, the State Bar has statistical information regarding these programs available on its website, with the exception of the Client Protection Fund, that anyone who'd like that information can simply contact me and I will get that statistical information to them.

CHIEF JUSTICE TAYLOR: Thank you Ms. Kremski your time is up thank you.

MS. KREMSKI: Thank you.

CHIEF JUSTICE TAYLOR: We will now move on to administrative matter 2006-31 – it has to do with immunity for statements made to agents of the Judicial Tenure Commission. Paul Fischer.

ITEM #13 – 2006-31 – MCR 9.227

MR. FISCHER: Good morning again. Paul Fischer on behalf of the Judicial Tenure Commission. Thank you for having me here on this day of high drama and the people's court. This was a proposal by the Commission that its agents, - sometimes the Commission will hire private investigators, or court watchers, or other such people who are not necessarily employees or commissioners to have them be provided with the same degree of immunity that our (inaudible) are provided by court rule to the commissioners and the

employees. So as a matter of trying to provide an equality so some people wouldn't be subject to civil suits – or at least they'd be immune from such civil suits for anything that maybe said to them. The Commission wholly endorses this proposal. Unless there are any questions, I have nothing further.

CHIEF JUSTICE TAYLOR: Thank you sir. Barbara Willing.

MS. WILLING: (inaudible – off mike) It's wonderful that you have three separate issues that tie into my feelings as a court watcher. The Judicial Tenure Commission again should not be made up of attorneys and judges, it needs to be made up of citizens who have concerns for the integrity of the judicial system. And to me integrity is one of those things that looks really good on paper and we can spew it out wherever we go. But integrity really is doing what's right when nobody's looking. If you stop at a stop sign at four o'clock in the morning when nobody's looking, that's integrity. If you don't stop at the stop sign at four o'clock in the morning is that a lack of integrity, not necessarily, but it could be for your safety or whatever, but it could be those problems. This is a matter of integrity. We are – anything that takes away and grants immunity we should lessen governmental immunity not encourage further governmental immunity. If somebody is investigating an errant attorney or an errant judge, who is also an attorney by the way – so my feelings are is that if you get to the Judicial Tenure Commission and you get sanctioned then you also should be disbarred. You know they shouldn't be one or the other. You know maybe suspended from practice or whatever, but I mean if they go hand in hand you can't be a judge without being an attorney so if you're a bad judge and you're a judge behaving badly, than you're also an attorney behaving badly and they go hand in hand. But that is a separate agency. The Judicial Tenure Commission should not have governmental immunity for the same situation that I exposed to you before. The Chair of the Judicial Tenure Commission had absolutely, positively criminal knowledge of criminal acts by a judge and he chose to cover it up because it was his brother-in-law. Now should we grant him governmental immunity, I think not. As a matter of fact, is he granted governmental immunity for failing to turn it in? I equate this with a hospital worker, a doctor, a nurse, who sees child support going on – or who sees child abuse going on in an emergency room. By law they are mandated to turn it in; it's not a may or shall thing. They are mandated and they could be brought with criminal charges if they don't turn it in. The same situation exists here. If the Judicial Tenure Commission is aware of criminal conduct by a judge, then they need to turn it in and turn it in to a higher source. There's no ifs, ands, or buts about it. It's not a may or shall, it's a shall. And shall requires action, not judicial discretion. That's all I have to say on the subject thank you.

CHIEF JUSTICE TAYLOR: Thank you. Jan Eathorne.

MS. EATHORNE: Thank you. Last week in West Bloomfield, the Board of Trustees voted whether their city clerk Sharon Welsh (phonetic) should be provided legal representation under the city's insurance policy. The clerk was facing civil prosecution for reckless acts against a courthouse employee. The Board of Trustees voted no. It seemed that this kind of – giving them immunity – her immunity providing her the opportunity for legal assistance based from the city policy would just encourage other employees to act in similar reckless manners. I'm very concerned. Reckless, willful, or wanton acts are terms that you should be very familiar at. Your own employee – One of the Michigan Bar's own employee, Thomas Byerley was caught engaging in reckless, wanton perjury in a court proceeding, and the Michigan Bar rightly gave him the boot. I think that too many times the citizens do not see positive action on the part of the legal profession against peers who engage in outrageous conduct. Giving anybody immunity opens up a potential that that kind of behavior's gonna escalate. I spoke last year on the same topic and that was amendment 2004-33, and at the time we provided the rationale that since the federal court, if the request is reasonable, will provide that information to be open anyways, why would you have this other amendment, 2006-31, which seems so similar. I think there's a real gap between what people in the public experience from outrageous behavior on the part of legal professionals, and what you fully acknowledge. And I know that many, many complaints are sent in and they're just pushed aside, and giving anybody immunity would just make us (inaudible) even further that even more things are being done that aren't in the best interests of the public. Therefore, I appreciate you not adopting this proposal. Thank you.

CHIEF JUSTICE TAYLOR: Thank you Ma'am. Tom Whitaker.

MR. WHITAKER: Thank you once again. I don't agree with this. It seems pretty cut and dry to me, but I don't – I'm not - I've never been granted any kind of immunity from anyone you know. Who's better? I hate judging people myself. I'm very capable of it just like everybody else, but that's something that really bugs me you know. I don't like doing it, it's not right and no one should get immunity you know. I don't – people need to be – I'm held accountable for what I do. When I do something good I get a pat on the back and an atta boy you know. This comes down you know you need to look out for the people. You are – I see where you are – you protect the people from the government, that's what I see part of your job as. I hope you do it properly. That's all I can hope for. Thanks again.

CHIEF JUSTICE TAYLOR: Thank you. We move on to Item #14 – 2006-48 – regarding Administrative Order 2006-8. United States Court of Appeals Judge Richard Suhrheinrich is the first speaker.

ITEM #14 – 2006-48 – AO 2006-8

JUDGE SUHRHEINRICH: May it please the Court. I am a senior judge for the United States Court of Appeals for the Sixth Circuit and have been a member of this bar for forty-four years. I speak today in favor of the proposed rule. Start with the basic principle that courts only speak through its orders or opinions. In my view judicial conferences regarding cases and controversies must be confidential for at least four reasons. One, to invade the confidentiality of the judges' conference may well restrict the judges' willingness to engage in a free and robust debate. It interferes with testing out our different theories. Two, information coming out of conference before opinions could be used in an incorrect manner by parties of the lawsuit. In the federal system we require our law clerks to sign a contract indicating that they will not disclose anything that goes on in chambers. Three, judges are not bound by what they say or indicate in conference. Frequently after reflection judges change their minds. This would be more difficult if conferences were not kept confidential. And fourthly, confidentiality in my view promotes civility among the judges. If you cannot be candid with one another, it seems to me judges in an appellate situation cannot do the work that the people of Michigan or the people of the United States have placed them in that position to do. Without confidentiality, the focus will be on the decision maker and not the decision. And, of course, it is the decision that governs. The United States Supreme Court has a tradition of secrecy. And let me read to you because I think it's very pertinent the United States Supreme Court Guide to U.S. Supreme Court the Third Edition. "Tradition plays a major role in the operation of the Supreme Court. The Court's insistence on the historical continuity of its procedures and its strict adherence to conventions of secrecy and formal decorum have yielded little to a changing moods and social patterns of a contemporary world outside of its chambers. At best, the overlapping network of tradition gives the Supreme Court an aura of substance, dignity, and caution that befits the nation's highest institution of law and the public's confidence in its integrity, sobriety of purpose, and independence from outside pressures of justice." And this last paragraph if I may. "Among the most – the court's most important traditions is secrecy which applies not only to formal deliberations, but also to disclosures of personal disagreements and animosities among the justices. The unwritten code of secrecy has made the Court the most leak-proof of Washington institutions." If that tradition is good enough for the Supreme Court of the United States, it ought to be good enough for this Court. And if this Court cannot adopt and continue a tradition such as this then it needs the rule that you now propose.

CHIEF JUSTICE TAYLOR: Thank you sir.

JUDGE SUHRHEINRICH: Thank you.

CHIEF JUSTICE TAYLOR: Judge Peter O'Connell.

JUDGE O'CONNELL: Good morning. Twenty-eight years ago as one of the youngest judges in the state of Michigan, now at age fifty-eight I'm one of the most experienced. That experience has taught me that being a judge is a noble profession. The integrity and public confidence of this profession should be protected at all costs. And if that requires a deliberative process rule, I am in favor of such a rule. I'm also an adjunct professor over at Thomas Cooley Law School, and one of the things I teach at Thomas Cooley Law School is the Freedom of Information Act. In my opinion the Freedom of Information Act is one of the most greatest, best inventions in the history of a free society. Its purpose was to open up governments so that the people could participate in a democratic process. Getting FOIA through Congress in 1966 was an interesting, very interesting historical process. The debate was vigorous, the comments were passionate, much like I anticipate that we will see today. But very wisely and very astutely the Freedom of Information Act provides for a deliberative privilege. The privilege allows policy makers in our government to speak their minds about critical issues without the fear of their confidences being revealed to the public at large. Without the privilege and the candor and honest responses to problems judges' comments would be stifled. Through custom and practice the deliberative process has been with this court system for well over 200 years. The cornerstone of the deliberative process is trust, lack of fear that someone will reveal through gossip your candor and your forthright statements. I for one have been very thankful to my colleagues on the Court of Appeals on many occasions for their trust and their honoring of the custom and practice of maintaining the deliberative privilege. The deliberative privilege is much like the reporter's privilege. Who amongst us would talk to a reporter if we thought they would not honor the deliberative privilege. It's also much like the attorney-client privilege. Who of us would reveal secrets especially in a criminal defendant situation, our confidences to an attorney if we didn't think that we were protected by the privilege? A very wise Supreme Court Justice just wrote in a recent dissent. She said that the federal deliberative privilege operates to protect the public confidence in the judiciary. This is why I'm here today. I urge you to protect the public's confidence in the judiciary. The deliberative privilege is the same as the reporter's privilege. If I were to make comments to Brian Dickerson, or I make comments to Dawson Bell of the Free Press, or Stephanie Angel of the Lansing State Journal, even Todd Berg of the Lawyers Weekly, all if requested would honor the reporter's privilege. If they did not, I would never speak to them in a candid manner again. Without a deliberative process privilege judges would not speak candidly to each other and without candor the law will suffer a fatal setback. Speaking for myself, but not on behalf of the Court of Appeals, if you adopt this rule I ask that you adopt it for the Court of Appeals also. I would rather see the rule adopted then have to deal with a colleague who does not choose to protect the confidence and the integrity of the

judiciary. If you have any questions I'll answer them, otherwise thank you very much for giving me my three minutes.

CHIEF JUSTICE TAYLOR: Thank you sir. Judge Michael Warren.

JUSTICE YOUNG: Judge Warren, nice tie.

JUDGE WARREN: Thank you. Mr. Chief Justice and Associate Judges – Justices. I was privileged to clerk for Justice Dorothy Comstock Riley for two years, when Justice Cavanagh possessed just a tad less seniority. And like her, I love the institution of the Supreme Court. Thus, I strongly encourage us to look prospectively. Bad facts can make bad law, and we must look at what is best for the institution, the court, in five or even fifty years. I offer the following. Over thirty years ago a very diverse Supreme Court unanimously found that the Open Meetings Act was an impermissible intrusion into the most basic day-to-day exercise of the constitutionally derived judicial powers. The mere image of that understanding is that the court and their staff are to maintain the confidences of deliberations and cases and controversies. I offer two hypotheticals. First, a disgruntled secretary releases all of the justice's files to the press. Second, after circulating a draft majority, Justice A changes his mind and writes the dissent. Justice B then affixes Justice A's original opinion and supporting memo to this new majority. Justice A retaliates by releasing Justice B's emails, voice mails, and memos. How could these violations be addressed? First, the Judicial Tenure Commission. The Judicial Commission's purpose is to uphold the integrity of the judicial process. Although fellow Justices could eventually adjudicate a complaint against their colleagues such as contemplated by the Constitution and Michigan rules of court. This practice has occurred in other jurisdictions and can occur within federal judicial councils of several circuit courts. Alternatively non-Supreme Court judges could be appointed to act as the Supreme Court. The second mechanism is contempt. If the Court decided punishment was appropriate, putting aside employer remedies, the secretary would be subject to criminal contempt. Civil contempt would be unavailable since she cannot unring that bell. There is a strong argument that Justices A and B could also be subject to criminal contempt. Michigan's broad definition of contempt appears to include these circumstances. Although rare courts have noted that a violation of a higher court's order could be considered contempt and likewise councils of the federal circuit courts may find their colleagues in contempt. However, my humble research has revealed no case in which a state supreme court has found a colleague in contempt. Although this Court is a pioneer, this may be one arena the Court would be wise not to do so. When explaining the need for the United States Senate to Jefferson, Washington asked why did you pour that coffee into the saucer? To cool it replied Jefferson. Even so said Washington, we pour legislation into the senatorial saucer to cool it. When addressing misconduct of a

fellow justice, the Judicial Tenure Commission is the saucer. Furthermore, one could strongly argue that the ratifiers' adoption of the very specific mechanism of the Judicial Tenure Commission in 1968 displaced the otherwise inherent authority of the court to find judicial officers in contempt. This appears to be an issue of first impression and deserves a very close scrutiny. The third mechanism is removal from office by the Legislature. Grave misconduct can be and should be addressed by the elected representatives of the people and there are two constitutional provisions to allow the same. I have annotated my comments with various citations. I see no questions, thank you very much.

CHIEF JUSTICE TAYLOR: Thank you sir. Patrick Clawson.

MR. CLAWSON: Good morning once again. I'm a former television reporter. As a matter of fact I used to cover the Supreme Court years ago. So let me tell you a story to put some things into perspective and I'll make this very brief. Late last year the Court had a crisis. Court officials including justices were talking out of school to the media. They said unflattering things about the administration of justice. One Justice issued scathing dissents about the conduct of fellow judges. The Chief Justice responded by ordering a clamp down, documents were ordered kept confidential. Publication of dissenting opinions were suppressed. The Chief Justice ordered fellow judges not to release information about cases they deliberated now or in the future and severe punishment was threatened for court personnel, including judges, who might leak information about those deliberations, but the punishment was not specified. The Chief Justice said the rules were to protect the deliberative processes of the Court and to enhance confidence in judicial work, but his actions were criticized by the press and by civil libertarians, and also by the U.S. government as antidemocratic. Of course I'm talking about (inaudible), the Chief Judge of the Supreme People's Court of Communist China. A very odd parallel between events on that side of the pond and what's going on here in Michigan. Your honor, I hope we're not adopting the Communist Chinese system of justice here in Michigan. My experience over thirty years has shown that openness is essential to public trust in the judiciary and public trust in justice. And without it we have nothing. Rightly or wrongly, fairly or unfairly, the recent incidents here at this Court have created a public perception that there's a stench of corruption here. I hope that's not the case, but it must be removed it cannot be covered up. All public officials, and you are elected public officials at the Michigan Supreme Court, all public officials have an obligation to speak to their constituency, to speak to the public, to explain why you're doing what you're doing. We have elected you to uphold the Constitution, not to mug it.

JUSTICE MARKMAN: Mr. Clawson are you aware of any appellate court outside of Communist China, say the United States of America for example, which does not protect the confidentiality of its conferences and its deliberations?

MR. CLAWSON: Your honor I recognize that there is a valid need to protect confidentiality on discussions about pending cases I have no argument with you on that at all. The proposed order of the Court, however, creates that in perpetuity. I don't happen to think that's good for the American system of justice and I don't happen to think that's good for the American people.

JUSTICE MARKMAN: What do you mean it creates an in perpetuity? I don't understand that.

MR. CLAWSON: The Administrative Order that has been issue by this Court makes a flat blanket ban period on release of documents -

JUSTICE MARKMAN: Well, let me ask you the same --

MR. CLAWSON: memoranda, recorded conversations.

JUSTICE MARKMAN: Mr. Clawson let me ask you the same question again.

MR. CLAWSON: Yes sir.

JUSTICE MARKMAN: Are you aware of any appellate court in the United States of America today, yesterday, 1789, that has not protected the confidentiality of its conferences in deliberations?

MR. CLAWSON: The courts have historically protected the confidentiality of their deliberations. However, it's not a necessarily (inaudible) perpetual basis. I believe that the order issued by this Court, while well intentioned, is overbroad, and it will just further a - further enhance a bad public perception that is developing in this state about the integrity of this Court. And that should be an issue of concern to all of you. We must restore public confidence in the integrity of this Court.

JUSTICE CAVANAGH: You're talking about in perpetuity references a probe – the proposed rule's prohibition against disclosing anything even after an opinion is in the books and released is that right?

MR. CLAWSON: Well, the way I read the order it's a blanket order and goes in perpetuity and frankly I think it would probably be a big hindrance to you Justices writing your memoirs at some point in the time explaining to the public how you reached your decisions about some things. And I think I as a taxpayer and as a person who pays your salary, I have a right to know how you reached

certain decisions. And for purposes of justice and the administration of a case, you may want to keep some of that information confidential for a specific period of time so there is not a public perception of bias or impropriety in the judging of cases. But that's not necessarily something that should be locked up into the dust bins of history forever away from public sight.

CHIEF JUSTICE TAYLOR: Thank you Mr. Clawson.

MR. CLAWSON: Thank you sir.

CHIEF JUSTICE TAYLOR: Rita Jacobs.

MS. JACOBS: Good morning Chief Justice Taylor and honorable members of this Court. My name is Rita Jacobs and I address you as a citizen of this state. The order that you adopted followed some circumstances that raised much media attention, and you're now asking for suggestions on sanctions for anyone who violates that order. And I say don't shoot our messenger. The public generally is unaware of what transpires in this Court in terms of administrative matters. And personally I think you need more media exposure not less so that voters are able to make informed decisions. The public needs a court it can trust, and acting in secret does nothing to enhance public trust and suppressing minority opinions only enhances public distrust. I view the adoption of this order as judicial activism. Our Constitution has a procedure for removal of judges by the executive and legislative branches, and our Constitution also requires that dissenting opinions by Justices be in writing. Until our Constitution says differently, you need to leave the removal of Supreme Court Justices to the legislative and executive branches, and stop stifling minority opinions. Your attempt to silence Justice Weaver and your refusal to publish her dissent amount to attempted constructive removal of Justice Weaver, and you do not and should not have that power.

JUSTICE MARKMAN: Ms. Jacobs can I ask you is there a single word of any proposed dissent by any Justice of this Court that has been suppressed.

MS. JACOBS: It was my understanding that it was – that the clerk was ordered not to publish one of Justice Weaver's dissents.

JUSTICE YOUNG: Do you know whether it was published?

MS. JACOBS: Pardon?

JUSTICE YOUNG: Do you know whether it was published?

MS. JACOBS: I do know that it was later released and published, but I have a concern here that this particular order will be used to suppress dissenting opinions or whatever is written in dissenting opinions, and I do not find that that is correct.

CHIEF JUSTICE TAYLOR: Thank you Ma'am. Dan Diebolt.

MR. DIEBOLT: Thank you Chief Justice Taylor, fellow members of the Supreme Court. My name is Dan Diebolt and back in September I signed up to come to an administrative hearing here and I was I think seven minutes late and the whole administrative hearing had concluded. I'm kind of very surprised to see this many people here, so the issues being addressed they must certainly be of great public importance because I believe there's at least 100 people in the chamber here. Because I'm not familiar with your procedures, I'd like to ask if I may whether these hearings are held solely for receiving public input or whether the Justices will be taking a vote during this hearing. Will you be voting on this administrative order during this hearing?

CHIEF JUSTICE TAYLOR: No.

MR. DIEBOLT: What I'd like to do is call your attention to Michigan statute 600.224. In relevant part it's captioned as meetings regarding court rules or administrative orders opened to the public; procedures; court defined. Number one, the Supreme Court shall adopt procedures to insure that when a majority of Justices of the Supreme Court or judges of a multi-judge court meet to discuss or decide upon court rules or administrative orders the meeting shall be opened to the public. I think this is very clear that not just to receive public input but whenever a majority of the Justices meet to discuss or decide pending court orders or administrative rules that that has to occur in public. Now Justice, I'm sorry, Judge Warren previously in his speech called your attention to an opinion I think the Michigan Supreme Court made several decades ago when the Open Meetings Act was being adopted. In a rare decision, it was a letter opinion, meaning that there was no underlying litigation, the Supreme Court wrote addressing the Speaker of the House, and the Leader of the Senate, and the Governor that due to their inherent rulemaking authority they exempted themselves from the provisions of the Open Meetings Act and through their own administrative orders created their own procedures. I would like to mention, read a quote from Justice Warren Burger. "A court which is final and unreviewable needs more careful scrutiny than any other. Unreviewable power is most likely to self-indulge itself and least likely to engage in dispassionate self analysis. In a country like ours, no public institution, or the people who operate it, can be above public debate." Whatever the status of MCL 600.224 regarding the judges discussing and deciding matters before the public I think Justice Burger's comments should be well considered. I

came to learn of this quote by reading three books. Mr. – Justice Burger's quote was in the *Brethren* a documentary by Bob Woodward detailing the inside matters of the Supreme Court. There were two other books most recently *Closed Chambers: The Eyewitness Account of the Epic Struggles Inside the Supreme Court* by Edward Lazarus who's now a prosecutor in California. And a third book *The Honorable Lewis E. Powell: Five Years on the Supreme Court*. Each of these authors dealt very intimately with internal court proceedings. They consulted documents on file with the Library of Congress, including judges' papers, none of them to my knowledge have received any reprimand or disciplinary action for their disclosures to the public. In fact I'd say that the public has benefited from these writings enormously.

CHIEF JUSTICE TAYLOR: Mr. Diebolt I think your time is up. Thank you, sir. You can submit anything else you have in writing to us.

MR. DIEBOLT: Thank you.

CHIEF JUSTICE TAYLOR: Chief Judge William Whitbeck.

CHIEF JUDGE WHITBECK: Good morning. I have to adjust this mike a bit, and forgive me that I have something of a frog that I'm unable to shake. My name is William C. Whitbeck, I am the Chief Judge of the Michigan Court of Appeals and my testimony today obviously concerns Administrative Order 2006-8. I emphasize first that I am speaking on my own behalf as Chief Judge of the court and not on behalf of the Court itself. And secondly, that my testimony centers primarily on the practices and procedures of the Court of Appeals. I should add that I have consulted with former Chief Judge Robert Danhof and former Chief Judge Richard Bandstra with respect to past practices before our Court. As I read the administrative order, it applies implicitly at least to two situations. First, to communications from the staff of the court to the judges or justices, and secondly, to communications between and among judges and justices. As to the first situation, communications from the staff of the Court of Appeals to its judges have always been considered to be confidential. And indeed each new employee at the court signs a confidentiality agreement. The personnel manual of our court and this Court has a confidentiality section, and the template for all internal memoranda within our court says confidential for court use only. To my knowledge, these restrictions have been knowingly breached in only one instance, and that was unfortunately a part of the criminal activity that occurred in the Bronson case. In that circumstance Judge Bronson at least allegedly turned over a prehearing report through an intermediary to one of the litigants. As to the second situation, communications whether written or oral between and among judges of our court have always and also been considered to be confidential. We are a decentralized court with twenty-eight judges located in four separate offices

throughout the state, and therefore we communicate extensively by email, by phone, and by written memoranda. These communications I believe are vital to the prompt and proper resolution of the cases before us, and I see no aspect to the public interest that would be advanced by raising even the possibility that their contents would be later revealed. In this regard, I refer the Court to the role played by Chief Justice Earl Warren in the seminal case of *Brown v Bd of Ed*. You will recall that the decision in that case was unanimous, that was the Chief Justice's gift to the nation in what was probably the most important case of the 20th Century. According to later accounts, the Chief Justice arduously negotiated this unanimous result with his fellow justices by flattery, by cajolery, by compromise, and yes, even by horse trading. In other words, he used every tool at his disposal to assure that the Supreme Court would be unanimous in its decision. I ask you to consider whether Chief Justice Warren could have achieved that result if he knew that every word he said, every draft he circulated, every change he made, might show up later in either a concurrence or a dissent. In my opinion under such circumstances, the Court would have fractured and the nation's progress toward equal rights would have been considerably more difficult. In summary, I see no public interest whatever would be advanced by altering the long-standing understanding one, that communications to the court from its staff are confidential and two, that communications between and among judges and justices are also confidential.

CHIEF JUSTICE TAYLOR: Thank you sir. Retired judge Joseph Swallow.

JUDGE SWALLOW: Good morning members of the Court. I'm here today to sympathize with Justice Weaver - her claims of abuse of treatment and characterization of this rule as a gag order. I want to say that as a retired trial judge I can attest to many of the tactics that she now complains of were in the past perpetrated against myself and other judges. The example I'd like to cite today is my dissent to the process by which the Michigan trial courts were consolidated. To refresh the Court's memory, the Supreme Court rather authored that consolidation plan, nursed it over many numbers of years by various and many trial court projects, publicized it with extensive public relations, and lobbied it through the Legislature. By any objective standard, this was the Supreme Court's baby. Yet despite its parentage, court consolidation was of such doubtful constitutionality that the very Legislature that passed the bill requested this Court to render an advisory opinion to which you replied sorry, not now, maybe sometime in the future. It was during the early part of 2002, a legislative session, when the bill was pushed through the Legislature with much political haste. But even the arm twisting of then-Governor John Engler could not necessarily – could not garner the necessary two-thirds vote for immediate effect. So pursuant to the Constitution, the legal force of the bill – the bill becoming law could not occur

until 90 days after the term of the Legislature, in this case April 1, 2003. Despite the doubtful constitutionality and the absence of lawful authority, it did not deter the Supreme Court from directing the trial judges of this state to begin the process of consolidating trial courts forthwith. Then in July 2002, nearly nine months before the effective date of the bill, your minions arrived at the 26th Circuit and advised me to – and started directing consolidation and I questioned the lawful authority by which they were there and I questioned the constitutionality. Then Justice Corrigan as you may remember, you hand delivered a letter to me advising me that I better get with the program or I would be removed as Chief Judge. I advised you then by return letter that hey, mechanically we're doing this, but I held out the option of continuing to speak out about the unconstitutionality of the bill as well as the fact that there was no real lawful authority to do what was happening. Apparently the intimidation of your letter not working, then Court Administrator John Ferry was directed to draft a letter and send it to the Alpena News claiming Judge Swallow's an obstructionist. And I'm sure as calculated that resulted in a headline on the editorial page "Swallow is an Obstructionist." Now any objective appraisal of your conduct --

CHIEF JUSTICE TAYLOR: Judge Swallow --

JUDGE SWALLOW: Yes.

CHIEF JUSTICE TAYLOR: Your time is up sir, if you wish to submit --

JUDGE SWALLOW: Okay, I got it in notes, and also I'd like to advise the Court that I enclosed in my notes the copies of the various letters, the editorial, and I think if objective standards can look at that and --

CHIEF JUSTICE TAYLOR: All right.

JUDGE SWALLOW: Just one comment. Any society that oppresses its judges when things are seriously wrong, is not going to be a free society very long. Thank you very much Justices.

CHIEF JUSTICE TAYLOR: Thank you. Judge Bill Schuette. We'll have no more of that, it's unnecessary. Bill Schuette.

JUDGE SCHUETTE: (off mike) The din of the applause went over my name. Mr. Chief Justice, Justices of the Michigan Supreme Court, my colleagues and friends, my name is Bill Schuette, I'm a judge on the Michigan Court of Appeals, and I'm here today to speak in favor of Administrative Order 2006-8. Now in my opinion this proposed order involves two things. First, confidentiality and the need for thoughtful judicial decisions. Second, it's the integrity of the

system to make sure it does not disintegrate into chaos and have a chaotic Michigan judiciary. In my opinion, the deliberations of Michigan judges, Michigan justices, their musings, their observations, their questions, their concerns, their frailties, they're arguments, must be kept confidential or otherwise this whole system blows up in smithereens. Look at the federal example that Judge Suhrheinrich was so eloquent in describing. If the musings, the observations, the questions, the concerns, the arguments between Scalia, Ruth Bader Ginsberg, whatever they might be were to become public, plastered across the newspapers, legal scholars would be decrying the demise of the federal system and then the New York Times would be keelhauling justices who broke this privilege, this important item we call confidentiality. So my point is confidentiality in judicial decision making is key essential to the deliberations we all make as judges and justices. And the principle of confidentiality of the United States Supreme Court should be mirrored here in the State of Michigan. And let me say one thing, no one, no one is above the law, whether that's a governor, a judge, a justice, president, wherever he maybe situation, and if we has a judge or a justice, or wherever misdeed or violation of the law either are reported to the FBI, the Michigan State Police, but you don't call the newspapers. Don't drag the judicial system through the mud. I would support and urge you that you adopt this rule of confidentiality which is essential to the Michigan and the United States system of justice. Thank you.

CHIEF JUSTICE TAYLOR: Thank you sir. Devin Schindler.

MR. SCHINDLER: Good morning your honors. I come to you today as a simple attorney and college professor. I don't speak on behalf of anybody except myself and because I have a long-abiding honor for this Court and a deep, deep concern about the administration of justice, that is the oath I took. As an officer of the Court, the only standing, the only foundation I have in the community comes directly from the honor and dignity of this organization. The light that reflects from you reflects on all of us practicing attorneys. I'm not an officer of the Legislature, so I don't have the power to (inaudible). I'm not an officer of the Executive Branch, so I don't have the police and militia. What I have is the honor and respect that has traditionally been accorded by our society and community on this organization and the judges who so honorably served it. I respectfully submit that anything this Court can do to protect and support that dignity and that honor reflects on all of us who have the honor and privilege of serving our communities as lawyers. For that reason, I'm speaking in support of this administrative rule. Frankly I'm somewhat surprised as a former law clerk that it's even necessary because certainly when I worked in the federal system, it was understood that what we talked about, our deliberations, our discussions as so eloquently put by Judge Schuette a moment ago were private and confidential. Now having said that I do recognize and I do appreciate the First Amendment issues that some of you have

raised. In my analysis of this particular order, I would suggest that it is analogous to a reasonable, time, place, and manner restriction. To the extent we have briefs – grievances, to the extent we have statements that we feel the public should hear, under the Court's decision *In re Chumaro* (phonetic) the Justices have the vehicle to discuss some of the political issues that underlie this Court. But I respectfully submit that in order to protect the honor and the dignity of this organization, these discussions should occur in the political realm of reelection, in front of the Judicial Tenure Commission, and not in the opinions and not by exposing the confidential deliberations because what you do reflects on me and the many, many individuals who have taken that oath. Thank you.

CHIEF JUSTICE TAYLOR: Thank you sir. Tom Whitaker. Retired Judge Kurt Hansen.

JUSTICE CAVANAGH: Here he comes.

CHIEF JUSTICE TAYLOR: Oh, I'm sorry, I'm sorry.

MR. WHITAKER: My hearing is really bad I was in another room listening.

CHIEF JUSTICE TAYLOR: I'm sorry.

MR. WHITAKER: It's really interesting being here today you know thanks for inviting everybody – or inviting everybody - you didn't have much of choice I guess I don't know. I don't think that – I lost my train of thought forgive me. It comes down to basic principles, what's right is right and what's wrong is wrong. Confidentiality it's – boy it's an interesting question I'm not sure you know you guys do need to talk amongst yourselves and come up with it. The public does have the right to know what's going on. They do have the right to know why decisions are made I believe. It's pretty complex you know if I'm talking to a friend I have a reasonable right to believe that that conversation's gonna stay there especially if that's where I want it to be, but you do have an obligation to represent the people number one you know. The people's interest comes before your own, before my own. That's what I believe. I hope it helps with your – with what you're doing.

CHIEF JUSTICE TAYLOR: Thank you sir.

MR. WHITAKER: Thanks a lot.

CHIEF JUSTICE TAYLOR: Retired Judge Kurt Hansen.

JUDGE HANSEN: Good morning. I'm Kurt Hansen, private citizen. The way that I've broken this down is – Well, first of all what I want to cover with you is this reference to the Supreme Court. We have to remember there's a clear distinction between the United States Supreme Court and this Court in that they are not elected. So that the rules that apply to them they are not accountable to the public in the same way that you are having to run for office. When we run the Court by way of democracy as we do here as opposed to an appointed system, obviously the people have a right to know what you're doing, and why you are doing it, and how you are doing it. And I think that is a clear distinction as to why rules can be different for state courts as opposed to the federal courts. What I've done is I've broken this down into three different situations. One has to do with case and controversies that you deal with, and the other has to do with the administrative matters. The way I see it when you are involved in a case and controversy, during the deliberative process you have every right to have those matters kept secret in the same manner as we have with juries. However, once the deliberative process has ended, then anything that is relevant to the decision can in fact go into the actual decision itself and this would include any communications that were made during the course of the deliberative process. Once the decision has been made, then I believe that we are in a situation where any Justice has the right and sometimes even the obligation to go ahead and to explain what the decision was and explain all factors involved including any of the communications that were done during the course of the deliberations. I don't believe that we should have wholesale just sending out all of the memos or anything else of that particular nature, but by the same token certainly you have a right to tell people why you made the decision and what items you had that you relied upon.

JUSTICE MARKMAN: Judge Hansen?

JUDGE HANSEN: Yes.

JUSTICE MARKMAN: Why don't you believe in a wholesale lack of confidentiality for the internal memos that go back and forth on the Court.

JUDGE HANSEN: Why don't I?

JUSTICE MARKMAN: Yes.

JUDGE HANSEN: Because they are not essential to the decision. Those matters that are in fact taken into consideration for purposes of the decision I believe you know certainly can be disseminated.

JUSTICE MARKMAN: Isn't that largely the legal analysis that in fact is contained within all of our decisions? Or are you thinking something beyond that?

JUDGE HANSEN: Well, as I read the rule it's terribly broad. I think that it's overly broad and the way that it's written I think it applies to everything across the board.

JUSTICE MARKMAN: I guess I'd ask you the same question I asked Mr. Clawson at the very beginning. Are you familiar with any federal, and you distinguished federal courts from state courts, so let me strike that. Are you familiar with any state court in the history of the United States that's adopted the proposal that you're suggesting that some memos, and some internal communications, and some correspondence back and forth between the Justices during the deliberative process ought to be made public?

JUDGE HANSEN: I'm not aware of any that does. I'm not aware of any that doesn't.

JUSTICE YOUNG: Have you made yourself familiar with whether these practices --

JUDGE HANSEN: Pardon me?

JUSTICE YOUNG: Is that a statement that you have not done the necessary research to answer that question?

JUDGE HANSEN: I'm not aware of it no. I'm here as a private citizen.

JUSTICE YOUNG: It's not because you haven't -- you have studied and know the answer, you just don't know the answer.

JUDGE HANSEN: I don't know the answer.

JUSTICE YOUNG: Okay.

JUDGE HANSEN: Yes, that's correct. The third category I think is relevant is that of administrative matters, and on those matters I believe that you should be following the example of the Legislature in terms of the Open Meetings Act. I see no reason whatsoever why all the communications concerning administrative matters are not open to the public, and I believe that you should separate those matters that are administrative and you should have open meetings concerning those particular situations when you're acting as administrators you're aren't acting much different than a Legislature would be acting. And I see no reason for confidentiality whatsoever when you're dealing with administrative matters.

CHIEF JUSTICE TAYLOR: Thank you Judge Hansen.

JUDGE HANSEN: Okay, thank you.

CHIEF JUSTICE TAYLOR: Court of Appeals Judge Christopher Murray.

JUDGE MURRAY: Good morning Chief Justice Taylor, Justices of the Court. As you know my name is Chris Murray and I'm currently a judge on the Court of Appeals. I agree with what my prior Court of Appeals colleagues testified to you today. I'm gonna take on somewhat of a lawyerly role I hope, and tell you what you may already know which is that the law clearly does support the administrative order that I'm here supporting. One of the most well known cases addressing the subject is *Williams v Mercer*, where the Eleventh Circuit Court of Appeals held that judges must have open and candid discussions with their colleagues to affectively discharge their duties. "Judges, like presidents, depend upon open and candid discourse with their colleagues and staff to promote the effective discharge of their duties. Confidentiality helps protect judges' independent reasoning from improper outside influence. It also safeguards legitimate privacy interests of both judges and litigants." Another case worthy of consideration is a recent Illinois Court of Appeals decision in *Thomas v Page*. In addressing whether information subpoenaed from other justices and law clerks were subject to disclosure, the *Thomas* court recognized the importance of the deliberative privilege. "Confidential communications between judges and between the judge and the court staff certainly originate in a confidence that they will not be disclosed. Judges frequently rely on advice of their colleagues and staffs in resolving cases before them and having need to confer freely and frankly without fear of disclosure. If the rule were otherwise, the advice that judges receive and their exchange of views would not be as open and honest as the public good requires. In order to protect the affectiveness of the judicial making process, judges cannot be burdened with a suspicion that their deliberations and communications might be made public at a later date. As the United States Supreme Court has observed those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision making process." Seven years ago I was fortunate enough to become a judge. The last five years I've been a judge on the Court of Appeals. As all of you know, each judge on that court brings their own unique circumstances, experiences, education, and views to each case that comes before the court. Many times we all agree on the proper resolution of the case without much discussion. However, on many cases and any of those are the critical ones that will probably end up in your lap, the judges engage in lengthy and at times passionate discussions on how the case should be properly resolved,

how the trial court judge or tribunal performed, and many other matters relating to the proper disposition of the case. Whether it's through our face-to-face conferences, emails, memoranda, or draft opinions, the thoughts and concerns we privately share with one another are vital to the functioning of the court. As judges we only have our law clerks and our colleagues for this purpose. Without our written and oral communications being subject to the utmost confidentiality, there would never be a full, open, and frank discussion about the issues involved. Frankly ever since I started in the Court of Appeals I assumed that all of our discussions were confidential and have always treated them as such. So has every other judge in the court. I've also submitted written – much more detailed written testimony this morning with your clerk.

CHIEF JUSTICE TAYLOR: Thank you sir.

JUDGE MURRAY: Thank you.

JUSTICE MARKMAN: Judge Murray can I ask you one question please? Would your concern about confidentiality be vitiated at all if you knew that such confidentiality would be protected until the time of the issuance of the decision, but not beyond?

JUDGE MURRAY: No, I would still have the concern because – and you know we have our conferences and the opinion could be issued a month later, and not only is it still going up to your Court, but if I knew in a month my comments maybe – that I made privately during the course of the discussions and deliberations were going to be made public a month, or a year later, or two years later, I think would hinder all of our communications in the Court of Appeals. I hope that answered the question.

JUSTICE MARKMAN: Thank you.

CHIEF JUSTICE TAYLOR: Thank you sir. Richard McLellan.

MR. McLELLAN: Mr. Chief Justice and may it please the Court. My name is Richard McLellan. I'm an attorney here in Lansing, and I have submitted my statement to the Court clerk because I know my time is limited and so I'm gonna go to the end of the statement. What I tried to do as a practicing attorney who practices here in Lansing, and practices between all three branches of government, was to give you some way to think about this how each branch has its own rules as to confidentiality and transparency in different aspects of the proceedings. And those kinds of rules have been developed over the years. You're focusing on the issue of the amount of transparency and the amount of confidentiality of internal deliberations in this Court or in the Court of Appeals.

When I or other lawyers appear before you, what we want you to do is favorably consider our argument. We hope we get you to think about what we – our briefs, and we hope that we'll generate the kind of intra-Court deliberations and perhaps spirited internal arguments that will lead to primarily a well-reasoned decision, but hopefully one that we prevail on. So the deliberations are valuable to us as advocates before the Court, and we think – I think that the public's interest is best served when such deliberations are confidential and not subject to public vetting. Your decisions are important they state the law. What should count is your written decisions, concurrences, and dissents. And not the back and forth that we hope takes place as you come to a decision. One of my concerns is that as more and more of our communications in society including within this Court is that the communications are electronic in format. That we need clear rules as to the proper use of such information. The greater use of email, voice mail, similar electronic communications creates an imperfect paper trail that should not be subject to public scrutiny either during or after a decision. So I think that the confidentiality of internal deliberations is the public interest, it's a value to lawyers who appear before the Court, and its I think valuable to you in terms of having the ability to communicate. I tried to respond to the order to address the question of what sort of enforcement and sanctions should be. I only say that as I looked at this every body has to have its own – if it has the right to set rules, it must have the ability to sanction rules. There's really no outside body that could take action with respect to a Supreme Court Justice in terms of enforcement and sanction unless you went so far in a most egregious case to art 6, §25, removal, which I don't know its ever been applied, but you do have the – the Constitution does provide for the removal of a judge even though there's not sufficient ground for impeachment. So I did try to take a look at what kind of enforcement you could have, but I go back to my principle view – keep the intra-Court deliberations confidential. Recognize that as technology is changing we don't need partial records, emails, voice mails, that would really confuse the public and those of us. Speak through your decisions, and concurrences, and dissents. Thank you very much.

JUSTICE CAVANAGH: Mr. McLellan let me ask you.

MR. McLELLAN: Yes sir.

JUSTICE CAVANAGH: This is Item #14 on the Court's public hearing administrative agenda in which we solicit public input. We publish it for comment. People are encouraged to for lack of a better term lobby anybody on the court they wish to about antibundling, about Rule 19 of the Bar, would you draw a distinction between administrative matters and substantive matters?

MR. McLELLAN: Yes I would. I'd draw – I'm primarily focusing on cases that are before you. I recognize that administrative matters do have more of

a nature of administration or legislation if you will, and I've always thought that the rules are – that there is more transparency and there is more (inaudible) – but I would still argue that it would not be a good public policy for all of your internal sort of discussions to be made public. The input is much more public, but I don't – I draw a distinction but I do not believe even those internal deliberations should be transparent, completely transparent.

JUSTICE CAVANAGH: Thank you.

CHIEF JUSTICE TAYLOR: Thank you sir. Gilbert Engels.

MR. ENGELS: Good afternoon Supreme Court judges. My name is Gilbert Engels. I live in Grosse Pointe Farms, Michigan. This is the second time I've had an opportunity to make some presentation to this august body. The last was in Flint, Michigan in regards to the probate court and the plundering and the looting that was going on in Wayne County specifically and the documents. All of it has come – your order to audit all 79 probate court districts in the state. I understand at the present time now that seven years have transpired there are two cases - none in Wayne County where there's enough corruption to pave the Detroit River, Lake St. Clair, the St. Clair River, and all away across Port Huron with the trash of looting and plundering of elderly citizens. I warned at that time that confidence and jurisprudence was heading into low numbers. I stand here today to say I confirm that. The media of the United States is looking at Michigan and saying what is going on. I hear confidentiality, if I went to a thesaurus would I find cover up. Would I find the word secret? Confidence is going into negative numbers. This society is committing societal suicide. You people stand there and know what's right and what's wrong. Why is every public record of the citizens open to the public? But our public servants are secret. I don't have anything other to say - I am disgusted with what – much I've heard here today, not all by far. I'm angry. The citizens that are out there that are supporting you with their taxes and their votes are disgusted. They're losing their confidence. Woe under this nation when lawlessness becomes so high a priority to our government agencies that the citizens have no respect for the law, and we have nothing but anarchy and we are bordering on that in Detroit where I live – adjacent to – born and raise there. I have no more than a high school education, but I think I can analyze and look at with the brain the good Lord gave me to see what's going on, and I'm disgusted.

CHIEF JUSTICE TAYLOR: Thank you sir. Eugene Driker.

MR. ENGELS: Any questions?

CHIEF JUSTICE TAYLOR: Thank you sir. Eugene Driker. Scott Strattard.

MR. STRATTARD: Chief Justice Taylor, ladies and gentlemen of the Court, good morning. My name is Scott Strattard from the law firm of Braun, Kendrick, Finkbeiner. I've had the privilege as you know of appearing before you on many occasions and I am indeed grateful for this opportunity today. I stand in strong support for administrative Order 2006-8 – let me tell you briefly why. We all know the law is seldom a matter of black and white, contrary to what my immediate predecessor might believe, especially at the appellate level. Indeed that's why we have an appellate level. This necessitates a frank exchange of ideas during deliberations. Each of you brings to the bench your own unique life experiences and perspectives. That's good. It also will render differences of opinion inevitable. These differences likewise are good. In fact they should be encouraged. My concern is that a lack of confidentiality will stifle the frank exchange of ideas and mask the differences of opinion that should be exchanged and dealt with during deliberations. I have no doubt that when rendering a decision each and everyone of you is doing what you think is best for this state's jurisprudence. While I may not always agree with your decisions, that dedication is certainly good enough for me. I urge you to maintain your confidentiality for the sake of a free exchange of ideas between you. I thank you for your time.

CHIEF JUSTICE TAYLOR: Thank you sir. Cheryl Follette.

MS. FOLLETTE: Good morning. I'm here as a lawyer, a three-time elected public official, and a plain country girl from Northern Michigan. Most of the people that you serve don't know what you do. They don't know what any of us do. They don't understand how the courts work. They don't understand the rules of evidence, they don't understand the rules of procedure, they don't what it means when a side-bar takes place, why we go into chambers, why a jury is sequestered. But they can when explained understand that it is intended to protect the rights of the accused and their victims. But you are elected citizens of the state of Michigan. And as elected citizens you should answer to those who elected you. The administrative issues that this Court has to deal with should be transparent. I'm not talking about the decisions, I'm talking about the administrative issues. The administration of justice should be open. Lawyers talk about a malady known as black robe disease. It's an idea that when the robe goes on the power becomes absolute. Michigan doesn't need a star chamber.

JUSTICE MARKMAN: Ms. Follette if we were to clarify in the proposed rule that administrative proceedings are not within its scope, would that clarification make this rule satisfactory in your judgment?

MS. FOLLETTE: It would.

JUSTICE CORRIGAN: Doesn't the rule already do that by citing 1997-10 since that deals with the administrative process in our Court.

MS. FOLLETTE: I don't know because in front of me I have the agenda and under administrative order #14 there's absolutely no explanation of what it is that we are speaking to today so I can't refresh my memory. My additional comments are with regard to Justice Elizabeth Weaver whom I have known for almost twenty years. I would tell you that she has never been sad and rarely angry. As a mentor and model to countless women she has inspired many. She has always evidenced the highest ethical standards. The comments made about her by the Chief are interesting. He apologized after they became public, but it seems more like a child who's sorry that he was found out as opposed to truly sorry for what he said. The comments were meanspirited and malicious, and one can only wonder at the level of invective behind closed doors if these were stated publicly. Personally as a citizen I want to know what goes on behind those closed doors. Thank you.

JUSTICE YOUNG: Counsel, just a moment.

MS. FOLLETTE: Sure.

JUSTICE YOUNG: I thought in response to Justice Markman's question, you thought that there was a deliberative privilege for cases and controversy is that still accurate?

MS. FOLLETTE: I believe – as personally I'm an elected citizen of – I'm an elected member of a community college board and I had my feathers dusted mightily by the press and by the public when we decided that we were going to speak with one voice when we had reached a decision as a deliberative board. The citizens rose up in arms and said we want to hear what each individual that we have elected has to say on every issue. So in my heart of hearts I don't think that there's a need for transparency. If you say what you mean and you mean what you say, you should stand behind it. Why should you be afraid if you've changed your mind during the course of deliberation because someone has persuaded you otherwise, I want to know that. I want to know who you are and what you stand for and when I vote for you I want to know what I'm getting. And so I would like it all to be open, but at a minimum, the administration of justice there's no basis for administrative rules not being open.

JUSTICE YOUNG: Do you think that we as judges represent constituencies?

MS. FOLLETTE: You are elected by the citizens of the state of Michigan. I believe you represent every person in the state of Michigan.

JUSTICE YOUNG: Collectively, not individual constituencies.

MS. FOLLETTE: That is correct.

CHIEF JUSTICE TAYLOR: Thank you Ma'am.

MS. FOLLETTE: Thank you sir.

CHIEF JUSTICE TAYLOR: Richard Robinson. Michael E. Cavanaugh.

MR. CAVANAUGH: Good morning your honors. My name is Michael E. Cavanaugh. I'm not related to Justice Cavanagh or --

JUSTICE CAVANAGH: Is that with a "u" or no "u"?

MR. CAVANAUGH: any of the other Justices who have served on this Court with the name of Cavanagh.

JUSTICE YOUNG: If you were, you'd be on the bench.

MR. CAVANAUGH: That's true. I've often said you can never have too many Cavanagh's on the bench. I appreciate the opportunity to speak to you today. I've practiced law in Lansing for more than 35 years, and I've had the honor of appearing before this Court on several occasions as an advocate, and several years ago I had the honor of working with the Court through a committee to rewrite part of the court rules. I've also had the honor of knowing many of you Justices and prior Justices as attorneys when you were practicing attorneys, and I hold every member of this Court in the highest regard and my comments today are not directed against the judges of this Court, but rather to the Court as an institution. And I appear today to speak in favor of the proposed rule. I think it is essential that the deliberations of the Court remain private for two reasons. First as many speakers this morning have already said that reaching the right decision involves debate and debate will be most robust, and most candid, and most open if the Justices are allowed to express their opinions and have their opinions challenged and perhaps refine their opinions and maybe even abandon those opinions, and in order to do that the discussions have to be confidential. As far as I know, every court in the United States involves a process of confidentiality of their debates and that is for good reason. If a Justice needs to worry about reading about the debates in the newspaper the next day, the debates will stop. The second – I urge that the rule be adopted to preserve the dignity of the Court as an

institution, and to preserve the public's acceptance of the Court in its decisions. Everyday that this Court is in session something remarkable happens. Seven ordinary men and women get out of bed and they do ordinary things. They walk the dog, and they read the newspaper, and they worry about their bills. Then they come into the Hall of Justice and put on their black robes and something truly amazing happens. They're transformed into ministers of justice, and we call them your honor and justice. And more importantly we accept their decisions. I can think of no other country in the world where a decision as important as who will be the next president of the United States can be made by a Supreme Court and accepted without violence and the reason for that is is that courts have maintained their dignity, they have spoken through their published opinions, orders, and dissents, and I would urge this Court to continue that long practice to remain as internal debate and confidential debate those matters that are considered prior to a decision being issued, but once the court speaks, speak through the Court's orders, and decisions, and dissents. Thank you your honor.

CHIEF JUSTICE TAYLOR: Thank you. Elliot Glicksman.

MR. GLICKSMAN: Chief Justice Taylor, members of the Supreme Court. This is my first opportunity in many years since graduating law school in 1969 to appear before the Michigan Supreme Court. And I appear not as a practicing attorney, I represent no client, I've been most of my adult life as an academic lawyer. And so it's a privilege to appear here and present a viewpoint as an academic. And I appear like others and perhaps not as others this morning, but to be a contrarian, and I speak in opposition of this order. And I do so under the guise of looking specifically at this order. When one looks at the lines of it, I am concerned of the fact that it speaks in a universal tone. It states all correspondence, memorandum, and discussions regarding cases or controversies are confidential. I realize and recognize through my many years of being a member of this honorable bar and being at the height of this profession that communications are confidential – confidential to encourage full debate and discussion. But when we use the word all correspondence it obviously deals with and perhaps is in conflict with the Constitution of the state of Michigan, 1963 art 6, §6 which requires that justices shall write their decisions to explain in concise statements of facts their reasons for the decisions. Now this is extremely important for the litigants who await their decisions if in fact they cannot explain their decisions because they are controlled effectively by an administrative order which in essence precludes them from disclosing what in fact their decisions are made.

JUSTICE YOUNG: Can you give me – Excuse me -

MR. GLICKSMAN: And to that extent -

JUSTICE YOUNG: counsel –

MR. GLICKSMAN: Yes, your honor.

JUSTICE YOUNG: Can you give me an example of an inhibition and a dissent which you can envision that this rule would create?

MR. GLICKSMAN: Well, if we have a total blank of all correspondence or memorandum and their decision is to explain what perhaps went on in those discussions in chamber which relate to a decision that they wish to make let us say as dissent --

JUSTICE YOUNG: Such as a judge changed his mind.

MR. GLICKSMAN: Pardon?

JUSTICE YOUNG: Such as a Justice changed his mind on a point of law.

MR. GLICKSMAN: They could or they necessarily could very well be a part of that decision which in essence this order could in fact be a position which in essence would curtail that and I am suggesting --

JUSTICE YOUNG: So you think that I have a right to be able to point out that one of my colleagues changed their mind in route to a decision.

MR. GLICKSMAN: It's possible that they could, but certainly --

JUSTICE YOUNG: No – you'd think I'd have that right. Not to rely on what the opinion that they actually sign or write, but to talk about antecedent positions they had in reaching that.

MR. GLICKSMAN: But this particular rule indicates that confidentiality would include even after the case is decided.

JUSTICE YOUNG: That's correct.

MR. GLICKSMAN: So that again would be something that I would be concerned about when reading --

JUSTICE YOUNG: You believe that I – just – I want to pointedly ask my question. Do you believe I have a right to discuss a colleague – a fellow Justice's change of position in the opinion itself or afterward?

MR. GLICKSMAN: Well, I know that Justices do change their mind.

JUSTICE YOUNG: We hope they do.

MR. GLICKSMAN: Well, I would hope so too.

JUSTICE YOUNG: You hope as an advocate that I do. If I have a position adverse to you to start off don't you?

MR. GLICKSMAN: But again this particular order would perhaps preclude that if in fact we are saying that a Justice cannot disclose this particular material. In fact if we're talking about that Justice filing a particular dissent and explaining it because this particular rule would necessarily preclude it. And if you read this in terms of what the previous order was in 1997-10 which did not have any of these prohibitive conversations or in essence correspondence or memorandum which incidentally was just a few years ago and if we're talking about --

JUSTICE CORRIGAN: But that specifically -- Professor -- that specifically dealt with administrative matters -- 1997-10.

MR. GLICKSMAN: It dealt with administrative areas but it did not preclude this kind of material which could not have been disclosed to the Michigan public and that is my point that a few years later this Court saw fit to exclude these kinds of material to help the jurists explain to the public in an open concept why this jurist, individually, could have been any one of the seven, explaining this away. And my point is if in fact we are talking about the great purpose of privilege which I do understand after teaching this area, studying this area, writing in this area, why it was that if it was so important which I in theory understand why was this not uniformly signed on to. Why do we have dissenting points of view and that is something that I took into consideration standing before you and making a dissenting argument.

CHIEF JUSTICE TAYLOR: Thank you sir, your time has expired.

MR. GLICKSMAN: Thank you very much for the opportunity of presenting my views.

CHIEF JUSTICE TAYLOR: Michael T. Ross. Thank you. Michael T. Ross. Thank you. Barbara Willing.

MS. WILLING: My issue today is not about confidentiality because I want to start my statement out by saying yes, you must have confidentiality. However, it was the manner in which you reached this order that I have a problem with and it stems from my beliefs, and my love, and my passions for constitutions and the law and substantive and procedural due process of which this order and entry of this order lacks. And I believe that if it had been procedurally correct and that is by giving a reasonable notice. If I serve a subpoena on you, you can't you know I have to give you a reasonable notice to show up in court. We were entitled to reasonable notice which we did not get. And that is a due process sort of thing. I mean your own Justices didn't get it. And that's all I'm saying is that a reasonable notice and not any time you make any decisions under hysteria you always make bad decisions that's just how it is. And my problems with the order is very specific and I've already have spoken on it and it has to do with may and shall. I believe that the last line of your order should say the only exception to this obligation is that a Justice may disclose any unethical or improper behavior to the JTC and shall disclose any knowledge or belief of criminal misconduct to the proper authorities. And that way you have your judicial discretion on the one issue and you have your non – your judicial mandate, your citizen mandates on the other issue. And that's all I have to say. Thank you very much.

JUSTICE YOUNG: Are you aware that there's an ethical obligation for a lawyer having knowledge that a judge has committed an ethical or criminal --

MS. WILLING: It goes both ways.

JUSTICE YOUNG: Just a moment. Are you aware that we are already under an ethical obligation -

MS. WILLING: Yes sir.

JUSTICE YOUNG: to disclose those things.

MS. WILLING: This is why I was so perturbed and so annoyed when I took criminal acts to the state police and to the Judicial Tenure Commission and was told I have to work with this guy, oh my God, he's my brother-in-law I can't do anything. You know I mean that's shameful. It works both ways. I'm not saying that you as a judge are given more of a responsibility I'm saying we have an equal responsibility. If I witness a murder and you might witness a murder and you don't go to the police be it judge or just a normal citizen, you are as guilty as the guy who committed the murder because you've allowed it to go on. That's just my opinion, but I believe that that's accurate.

CHIEF JUSTICE TAYLOR: Thank you Ma'am.

MS. WILLING: You're welcome.

CHIEF JUSTICE TAYLOR: Eric Godmeyer (phonetic).

MR. GODMEYER: Hello Justice Taylor I appreciate you adding me on to the agenda because it didn't get in on time so I wasn't really sure that I had a chance to address the Court. One of the things that strikes me about the gag rule is something that's going on across the entire country as the news media, the politicians all attack President Bush either in support or opposition to him, and the public looks on with their jaws dropping wondering what in the world's going on. As I looked at the gag rule I thought it would be really interesting if Justice Weaver and Justice Kelly could perhaps discuss the pros and cons of it in French, but we really don't have time for that. It would be intriguing though. I guess to kind of boil it down there is a saying about the truth will set you free. And I don't believe that any of the deliberations that any of you talk about should have to be private regarding a court case. And it seems that the longer people stay in the field of law and study law books, the more they're forced in many cases to be pushed away from what is really the truth. In many cases they don't have a choice because of prior precedents they just have to deal with what's there. And I guess that I just have to say that I'm really opposed to this gag rule the way it is especially with the circumstances that led us here today and I guess if you decide to pass it from the standpoint of a private citizen, not an attorney, it will smell like a dead skunk in the middle of the road. Thank you.

CHIEF JUSTICE TAYLOR: Thank you sir. Eugene Driker.

MR. DRIKER: May it please the Court. At a time of widespread cynicism about government at all levels, the most important issue for this Court to face is that it has to have processes that are in fact fair and that are seen by the public and the bar to be fair. Whatever the merits are of the current controversy they are in my judgment dwarfed by the widespread sense of the public that the Court is in turmoil. The strong held positions of individual justices in my judgment need to be subordinated to the needs of the public that our Supreme Court is institutionally sound. And I think the public's need is being overlooked in this present controversy. This Court in its decision in the *Fieger* case on the merits quoted the U.S. Supreme Court's decision in *In re Snyder*. And it seems to me that that quotation is aptly applied here. The Court said "all persons involved in the judicial process, judges, litigants, witnesses, and court officers, owe a duty of courtesy to all other participants." That proposition was cited by this Court emphasizing the importance of integrity in the legal system. It seems to me under the current controversy there ought to be a recognition of due respect for the ability of justices to speak candidly in their deliberations without fear of

inappropriate disclosure. But I think also over the long history of this Court and the Supreme Court of the United States and other appellate courts that principle has on more than one occasion been ignored without consequences, without some type of punishment or sanction being involved. A rule requiring adherence to this principle is not wise, it's not needed,

JUSTICE YOUNG: Counsel?

MR. DRIKER: Yes, Justice Young.

JUSTICE YOUNG: Are you – there are in fact in this Court's history exceptions where members of the Court have disclosed matters. There are suggestions that that has happened at the U.S. Supreme Court. Are you aware of any of those prior disclosures being made under a claim of right? That is to say where the member not only makes the disclosure, but claims that they are entitled to do so.

MR. DRIKER: Justice Young I haven't had an opportunity to research this carefully so I can't answer that question. I just – I know from having been an advocate in this Court for 42 years and having read many of this Court's opinions, that sometimes this happens and I've never heard of anybody being punished for that and certainly it's happened --

JUSTICE YOUNG: But there's a difference here. The – either inadvertent or advertent disclosures have not been made under a claim of the right to do so as far as I'm aware. Are you aware of any circumstance in Michigan – there's a famous Judge Black disclosure, but other than that I'm not aware of anyone on this Court who has claimed a right to disclose confidences of the conference table.

MR. DRIKER: I can't answer the question, I haven't researched the point.

JUSTICE MARKMAN: Mr. Driker.

MR. DRIKER: Justice Markman.

JUSTICE MARKMAN: I think the explicit purpose of this hearing was you know what do we do about a circumstance in which the confidentiality of the conferences is disclosed publicly. It's not to consider any particular sanction or even a sanction at all which I think is your position and I respect that position, but what do you do about the situation I think goes to how does the Court operate in light of the fact that there is a claim of right on the part of individuals to disclose the confidences of the conference. How in light of that claim does the Court

proceed to discuss, and to debate, and to frankly debate, and robustly debate these cases in light of that specter hanging over the Court?

MR. DRIKER: Yeah. I guess the answer --

JUSTICE MARKMAN: And that's not a rhetorical question I really don't know the answer.

MR. DRIKER: Yeah. I -- when I was last before the Court several months ago Chief Justice Taylor asked me a question in the context of that *Tomac v The State of Michigan* case. And I'm gonna cite, in answer to your question, the same case that I cited in answer to the Chief Justice's opinion. Its *Sutherland v The Governor*, an 1874 case where Chief Justice Cooley at the time had to deal with the question of what do you do when the Governor doesn't sign a writ that the litigant claims he was obligated to sign, and Justice Cooley said all wrongs are not redressed by the judicial department. He didn't explicitly say that you leave it up to the electorate to decide, but that's the implicit message of this opinion and the answer I gave to Chief Justice Taylor a couple of months ago. If there are Justices who are subverting the system, it seems to me that the sanction is for good or bad the fact that we have an elected judiciary in this state and that the public will ultimately make the decision.

JUSTICE YOUNG: And what do we do in the meantime? If -- let me just make it very clear. Let's say that you are engaged in a joint legal representation. You have two other colleagues involved in the representation. One of those members said anything you say I'm going to the press and tell them. How do you conduct your common legal strategy under those circumstances?

MR. DRIKER: You can't very well conduct it Justice Young so I --

JUSTICE YOUNG: Isn't that really what we're facing here that one of our members says whatever you say I reserve the right to tell everyone my version of it.

MR. DRIKER: I guess the effort has to be made through conversation, perhaps through bringing in some outside people frankly to work with the Court on how this --

JUSTICE YOUNG: Do you think therapeutic intervention would --

MR. DRIKER: Well, I'm not trying --

JUSTICE YOUNG: So let me just ask – Does a therapist get to participate in our conferences?

MR. DRIKER: Well, I don't think that's the question, but I think that there are some issues before the Court – this one, the disqualification issue, where the Court could benefit by having somebody outside of this system come in – respected retired jurists perhaps from another state, somebody out of this framework to come in and assist the Court because the public is quite skeptical about what is going on and is concerned as is the bar. And this is subverting the institutional reputation of this Court and that's not what should happen. So I understand the problem that you posit Justice Young, I have not had a great deal of opportunity to research it, but —

JUSTICE YOUNG: But you recommend therapy.

MR. DRIKER: Pardon.

JUSTICE YOUNG: But you recommend therapy.

MR. DRIKER: No, I don't recommend therapy but I do think that the Court could benefit from some outsiders coming in to talk about some of these issues with you including this and including especially the disqualification issue.

CHIEF JUSTICE TAYLOR: I think that's largely what this hearing was about sir. Thank you very much.

MR. DRIKER: Thank you.

CHIEF JUSTICE TAYLOR: That concludes the hearing.